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Information

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Document

Document

Grain Services Board (GCB) operates the Grain Wheat Pool, a public corporation.

Le Comité des services de grains (CSCG) gère le blé de blé, une entreprise publique.

Board File: 85-0311
CLASSIFIED Document 85-0311
May 11, 1984

Board File: 85-0311
CLASSIFIED Document 85-0311
May 11, 1984

Lacking No. 1066

This document deals with the operations of the Grain Services Board (GCB) and the Grain Wheat Pool, a public corporation. The document is a summary of the operations of the GCB and the Grain Wheat Pool, as previously defined by the Board.

Le présent document porte sur la responsabilité opérationnelle du Comité des services de grains (CSCG) dans l'exploitation des blés de blé, une entreprise publique. Le document est un résumé des opérations du CSCG et du blé de blé, comme précédemment définies par le Comité.

The Board found that the operations of the Grain Services Board (GCB) and the Grain Wheat Pool, a public corporation, are necessary to the operations of the country, and that the operations of the GCB and the Grain Wheat Pool are a part of the overall operations of a single federal work, namely the country's economy.

Le Comité a conclu que les opérations du Comité des services de grains (CSCG) et du blé de blé, une entreprise publique, sont nécessaires aux opérations du pays, et que les opérations du CSCG et du blé de blé sont une partie des opérations globales d'un seul travail fédéral, à savoir l'économie du pays.

The operations of these public bodies and the federal work is characterized by the duty of providing efficient services to the public and the operations of the country, as well as the management and maintenance of the country's economy. The "bill" service" aspect of the country's economy is provided through the operations of the public bodies, which are responsible for the management and maintenance of the country's economy. The "bill" service" aspect of the country's economy is provided through the operations of the public bodies, which are responsible for the management and maintenance of the country's economy.

L'aspect de service public des opérations du Comité et du blé de blé est caractérisé par le fait que ces organismes ont pour tâche de fournir des services efficaces au public et d'assurer le fonctionnement de l'économie du pays, ainsi que la gestion et l'entretien de l'économie du pays. L'aspect de service public des opérations du Comité et du blé de blé est caractérisé par le fait que ces organismes ont pour tâche de fournir des services efficaces au public et d'assurer le fonctionnement de l'économie du pays, ainsi que la gestion et l'entretien de l'économie du pays.

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147 Government
Publications

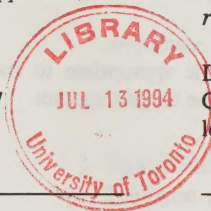
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Summary

Grain Services Union (CLC), *applicant*, and
Alberta Wheat Pool, *employer*.

Board File: 555-93311
CLRB/CCRT Decision no. 1067
May 31, 1994



Résumé

Syndicat des services du grain (CTC),
requérant, et Alberta Wheat Pool, *employeur*.

Dossier du Conseil: 555-93311
CLRB/CCRT Décision n° 1067
le 31 mai 1994

This decision deals with the constitutional jurisdiction of the Board concerning the inclusion of the positions of agro manager and assistant agro manager within the bargaining unit previously defined by the Board.

The Board found that the positions of agro manager and assistant agro manager are functionally integrated in the day-to-day activities and operations of the country elevators and form part of the overall operation of a single federal work, namely the country elevators.

The integration of these positions with the federal work is demonstrated by the daily ongoing intimate connection between the positions and the operation of the country elevators as well as the managerial and budgetary process and the management of labour relations at the elevators. The "full service" aspect of the country elevators' operational ability provided through the production contract process further emphasizes the functional integration of the two activities of grain handling and agro sales at the elevators.

La présente décision porte sur la compétence constitutionnelle du Conseil en ce qui a trait à l'inclusion dans l'unité de négociation déjà accréditée par le Conseil des postes de directeur et de directeur adjoint, produits agricoles.

Le Conseil estime que ces postes sont intégrés sur le plan fonctionnel aux activités quotidiennes exercées aux éleveurs régionaux et font partie de l'exploitation générale d'une entreprise fédérale, en l'occurrence les éleveurs régionaux.

L'intégration de ces postes dans l'entreprise fédérale a été prouvée par le lien étroit et permanent entre les postes et l'exploitation de l'entreprise des éleveurs régionaux, de même que que les activités administratives et budgétaires et la fonction de gestion des relations de travail exercées aux éleveurs. L'aspect «services complets» fournis par les éleveurs régionaux au moyen de contrats de production fait ressortir davantage l'intégration fonctionnelle des activités de manutention des grains et de vente de produits agricoles exercées aux éleveurs.

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
travail

The Board, applying a recent Supreme Court judgment, concluded that the activities carried on at Alberta Wheat Pool country elevators by agro managers and assistant agro managers fall within federal jurisdiction.

The Board found it appropriate to include these positions in the bargaining unit.

Le Conseil, en appliquant un récent jugement de la Cour Suprême, conclut que les activités exercées aux élévateurs régionaux d'Alberta Wheat Pool par les directeurs et directeurs adjoints, produits agricoles, relèvent de la compétence fédérale.

Le Conseil estime qu'il y a lieu d'inclure ces postes dans l'unité de négociation.

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Reasons for decision

Grain Services Union (CLC),

applicant,

and

Alberta Wheat Pool,

employer.

Board File: 555-93311

Decision no. 1067

May 31, 1994

The Board

Mr. Richard I. Hornung, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances

Mr. Neil R. MacLeod, for the applicant; and

Mr. A. Robson Garden, Q.C., and Mr. Robert G. Richards, for the employer.

Reasons

Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

On May 22, 1991, the Grain Services Union (the "union") applied to be certified for a group of employees of Alberta Wheat Pool (the "Pool" or "employer").

On November 27, 1991, the Board certified the union as bargaining agent for the following unit:

"all full-time employees of Alberta Wheat Pool, employed in the operations of primary country elevators in the Provinces of Alberta and British Columbia, excluding repair, maintenance and construction employees, NH3 drivers, area managers and those above."

The unit, as described, included the positions of agro manager and assistant agro manager.

The employer filed an application for judicial review with the Federal Court of Appeal to set aside that portion of the certification order concerning the inclusion of the positions of agro manager and assistant agro manager on the ground that the Board did not have constitutional jurisdiction to include those positions in the bargaining unit. The Court granted the application (Alberta Wheat Pool v. Canada Labour Relations Board and Grain Services Union (C.L.C.) (1993), 157 N.R. 91; and 93 CLLC 14,051 (F.C.A.)) on the basis that the Board did not address this specific issue and referred the matter back to the Board for rehearing and determination.

II

The evidence before the Board, as referred to below, reflects the facts and circumstances as they existed at the time of the certification application in 1991.

The Pool operates 265 country elevators in Alberta and Northern British Columbia. Its business operations consist of four principal components: (1) grain receiving, handling and shipping; (2) food processing; (3) farm supply; and (4) seed receiving, handling and shipping.

The Pool has been involved in the grain handling business since 1923. According to Richard Breakenridge, the Pool's Manager of Country Elevator Operations, the grain handling business consists of three main facets. First, farmers deliver the grain to a country elevator to be weighed and rated in accordance with quality criteria. The grain is then directed to the appropriate bin for storage. Finally, it is shipped from the elevator by rail.

In the 1950's, the Pool became involved in supplying farm products (hereafter "agro operations or activities"). During the 1970's, the agro operations at the Pool expanded markedly, principally because of farmer demand.

In essence, the agro activities consists of purchasing, distributing and reselling farm products (such as fertilizer, chemicals, twine and seed grains) as well as providing services such as grain blending, and fertilizer or chemical application services.

Agro operations are carried on at farm supply centres, agro centres and by agro managers and assistant agro managers at major country elevators (i.e., elevators with agro sales of approximately \$750,000 per year). They are also carried on at smaller elevators although there is no specific employee assigned to that activity. In short, virtually all elevators sell agro products to varying degrees.

Bryan Kercher, the Regional Manger of Region 3, explained that "grain-related work" consisted of anything to do with handling, receiving, blending, cleaning and shipping grain; while agro-related work consisted of anything to do with selling products or providing services. Based on the above definition, it appears that "grain handling" also refers to mixing and blending grains to improve the grade - as referred later herein in the evidence of Dale Szott - which is carried out at the elevator as part of the production contract process.

At the date of the filing of the certification application, the Pool operated 9 farm supply centres and 10 agro centres. The employees of both these centres were **excluded** from the bargaining unit in the certification granted on November 27, 1991.

Farm supply centres and agro centres are virtually the same except that agro centres are smaller. They are essentially retail outlets with storage facilities, consisting of a fertilizer storage and blending facility, as well as warehouse storage and equipment for the application of fertilizer and other chemicals. Although they provide a broader range of similar products and services as are available at country elevators, they are totally separate and distinct from the country elevators. This is reflected in the managerial reporting structure; as well, the employees who work there do not play any role in grain handling activities.

The typical agro facilities at a major country elevator consist of warehouse and fertilizer storage, a blending plant, seed bins, rental equipment for the application of fertilizer and other chemicals and an anhydrous ammonia (NH_3) storage tank. With the exception, in some instances, of the NH_3 tank, the facilities listed are adjacent to or located in the country elevators. In each of the locations with the disputed positions in question, the agro facilities are adjacent to and on the same property as the elevator.

The staff of a typical major elevator (or "station") is composed of a station manager, a grain manager, an assistant grain manager (in some cases), an elevator assistant, an agro manager, an assistant agro manager (in some cases), and an office assistant. There is also an agro manager position at a country elevator when the sales of agro products reach \$750,000 per year. An assistant agro manager position is created when there is a need to diminish the workload of the agro manager. In 1991, there were 29 agro managers and 4 assistant agro managers.

At major stations, agro managers share general office space with the station manager. Although he is responsible for his own correspondence and invoicing, the agro manager is assisted in this regard by an office assistant.

The evidence showed that some agro managers spend as much as 65 to 75 % of their time on grain activities whereas others spend only 10 to 20%. At some stations (for example, Stettler, Chipman, Enchant, Wanham), agro managers spend less time on agro-related work because station managers prefer to work in agro sales, therefore leaving less agro work and more grain work to be done by agro managers. In other cases (for example, Daysland, Wainwright, Cardston), the decrease in agro sales due to competition or other reasons explains the low percentage of time spent by agro managers on agro activities. In all, agro managers spend, on average, 70 % of their time on agro activities and 30 % on grain-related work. Assistant agro managers, for their part, spend even less time than agro managers on agro-related work and more time on grain-related work.

The Pool, like most successful companies, focusses on client service. The company's culture of comprehensive client service resulted in a situation where all employees working at country elevators are encouraged and expected to work as a team, in a unified fashion, under the direction of the station manager in an effort to meet all the clients' needs. Agro managers and assistant agro managers must accordingly perform grain-related work in order to respond to client demand. This is especially true during peak seasons or when employees on the grain side of the operation are ill or on vacation.

According to Mr. Breakenridge, the company expects everybody, at the station level, to be "one big happy family working together as a team with one leader." This operational concept is underscored in Exhibit 57, where the Pool's communiqué details management's intention that the Hours of Work Regulations issued pursuant

to the Code apply to agro managers, assistant agro managers and all other employees at the station "engaged in the operation of a primary elevator."

Agro managers and assistant agro managers work under the direct operational and managerial control of station managers. As part of their duties, agro managers must prepare an annual budget of agro sales for the station indicating the expected profit margin. This budget, which forms part of the global country elevator budget, includes common expenses related to both the agro sales and grain activities, and is reviewed and adjusted if necessary by the station manager. In short, there is only one set of "books" and the station manager is responsible for the profit and loss of the overall operation at the elevator.

Responsible for the effective management and financial success of the entire country elevator operation, the station manager is evaluated on the overall performance of his station. He is also responsible for promoting the Pool's services. If he deems it necessary, the station manager may make appropriate modifications to the general operation of the station, including the agro activities, in order to improve the profit picture.

The agro manager reports directly to the station manager, who in turn reports to the area manager.

Unlike the agro activities carried on at country elevators, the agro operations at agro centres are independent in every way of the grain activities. Although in some cases their facilities are very similar, they are managed independently of the country elevators and constitute independent profit centres. As mentioned earlier, the employees of the agro centres are not expected to do any grain handling work.

Agro centre managers, who report directly to area managers, prepare the agro centre budget and there is no intermingling of expenses with the employer's grain activities.

The budget is submitted directly to the area manager without the station manager's approval since the latter is not involved in the activities of the agro centres.

At smaller stations (for example, Delburne) where the agro sales are below \$750,000 per year and consequently there is no agro manager position, the station manager - who is then designated as "elevator manager" - is responsible for both grain handling and agro products sales. The agro facilities at these stations are somewhat similar to the ones found in the major stations. Depending on the size of the station, the station manager spends 5% to 30% of his time on agro activities. He is evaluated by the area manager based on his performance with respect to grain handling and agro sales.

Finally, in keeping with its business philosophy of providing a full service grain operation at its country elevators, the Pool has geared its country elevator operation, at major centers, to include the provision of agro products. This "full service" philosophy recognizes the fact that farmers are more likely to deliver their grain to elevators where they can get all of the services they require at one facility. In an effort to provide this full service, and to ensure that it keeps its market share of grain deliveries, the Pool introduced the concept of production contracts. The production contract constitutes an agreement between the Pool and the farmer whereby the farmer agrees to deliver **all** of his grain to, and purchase **all** of his agro products from, the Pool. On its part, the Pool agrees to supply the farmer with agro products interest free until a specified time - usually the end of the crop year (October 1). The farmer thus receives a concession on the cost of agro products which allows his interest-free payment to coincide with the approximate time he will deliver his grain to the elevator. The contract also provides for the possible payment of agro products with the grain being delivered. In return, the Pool ensures that it will receive the farmer's entire grain production.

It is apparent that the production contract is a very important part of the Pool's total marketing package. Although specific figures were not made available for all of the

regions of the Pool's operation, Keith McKee, Regional Manager for Region 4, conceded that up to 20% of the region's total deliveries in the 1991 crop year were based on production contract agreements. Dale Szott, the Agro Manager at Daysland, testified that pursuant to the total marketing program implemented at his station, as part of the production contract package, the grain received is often mixed and blended to ensure a better grade for the farmer. In addition, he testified that the only "edge" he had on his major agro competitor was that he could offer the grain concessions mentioned above to capture agro sales.

III

Federal jurisdiction over country elevators is found in Parliament's declaration contained in section 55 of the Canada Grain Act, R.S.C., 1985, c. G-10, section 55, enacted pursuant to section 92(10)(c) of the Constitution Act, 1867.

Canada Grain Act:

"55. (1) All elevators in Canada heretofore or hereafter constructed, except elevators referred to in subsection (2) or (3), are and each of them is hereby declared to be a work or works for the general advantage of Canada.

(2) All elevators in the Eastern Division heretofore or hereafter constructed, as defined in paragraph (d) of the definition "elevator" in section 2, are and each of them is hereby declared to be a work or works for the general advantage of Canada.

(3) All elevators in the Eastern Division heretofore or hereafter constructed, as defined in paragraph (e) of the definition "elevator" in section 2, are and each of them is hereby declared to be a work or works for the general advantage of Canada."

Constitution Act, 1867:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

10. Local Works and Undertakings other than such as are of the following Classes:

...

(c) Such Works as, although wholly situated within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

The relevant provision of the Canada Labour Code reads as follows:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

(emphasis added)

IV

In referring the constitutional issue back to the Board, the Federal Court of Appeal enunciated guidelines to determine whether or not the positions of agro manager and assistant agro manager fall under federal jurisdiction:

"In the circumstances of the case at bar, the Board, keeping in mind that the core undertaking (primary country elevators) was a federal undertaking, should have approached their evaluation of the subsidiary operation from the perspective of whether or not the employees of the subsidiary operation (in this case, the Agro Managers) were 'vital', 'essential' or 'integral' to the federal undertaking. Also germane to a determination of the jurisdictional issue is the question as to whether the work being done by the employees in question (the Agro Managers) is closely related to the operations of the core federal undertaking. [This court's

jurisprudence has assumed the authority of Parliament to legislate with respect to the labour relations of a federal undertaking operating a federal work with those of its employees whose functions are closely related to the operation of that work. See C.S.P. Foods Ltd. v. Canada Labour Relations Board, [1979] 2 F.C. 23; 25 N.R. 91 (C.A.). See also Canada Packers Inc., Shur Gain Division v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, [1992] 2 F.C. 3; 135 N.R. 6 (C.A.).]

(Alberta Wheat Pool v. CLRB et al., supra, pages 96; and 12,294)

V

Following the above decision of the Federal Court of Appeal, the Supreme Court of Canada in a recent decision described the nature and scope of the declaratory power contained in section 92(10)(c) of the Constitution Act, 1867. In Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327; and (1993), 93 CLLC 14,061, the Court, per Justice LaForest, directed that the declaratory power should not be interpreted narrowly and specified that:

"... The effect of a declaration is the same as if such work was expressly enumerated in s. 91..."

(pages 362; and 12,341)

The Court described the scope of the Parliament's declaratory power as follows:

"... A declaration incorporates a work as a functioning unit; in Laskin's words, the declaration 'must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character'; see Laskin's Canadian Constitutional Law (5th ed. 1986), vol. 1, at p. 629. ..."

(pages 363; and 12,341; emphasis added)

and further,

"... the legislative jurisdiction conferred over a declared work refers to the work as a going concern or functioning unit, which involves control over its operation and management. ..."

(pages 367; and 12,342)

The Supreme Court of Canada observed that there is no difference between federal "works" and "undertakings" with respect to the requirement for Parliament to control their labour relations:

"It is not necessary for me to engage in a consideration of the possible difference in scope between 'undertakings' and 'works' for the purposes of the various items in s. 92(10). I mentioned earlier that a work under s. 92(10)(c) means a work as a going concern, and to manage that going concern Parliament must have power to regulate the labour relations between management and labour engaged in operating the work. I see no logical or practical difference in the need for control of the labour relations in the management of an undertaking and in the management of a work as so understood. In that sense, a work is an undertaking, an undertaking, however, that must include a work. ..."

(pages 368; and 12,343; emphasis added)

VI

The question posed by the Federal Court of Appeal in terms of whether the subsidiary operation falls within section 92(10)(c) as a "vital," "essential" or "integral" part of the country elevators operated by the Pool suggests that the Court considered the agro activities at major country elevators, and the attendant positions of agro manager and assistant agro manager, as being separate subsidiary operations.

Given the recent ruling of the Supreme Court of Canada in Ontario Hydro, *supra*, the Board understands that it must first determine - in light of the evidence presented at the hearing which was not before the Federal Court of Appeal when it rendered its judgment - whether the agro activities at country elevators and the consequent positions of agro managers and assistant agro managers constitute, in fact, a separate subsidiary operation or whether, as described by the Supreme Court of Canada in Ontario Hydro, they form part of a single federal work as a going concern or functioning unit.

If we conclude that the agro activities carried on at the country elevators, and the consequent positions of agro manager and assistant agro manager, constitute a "subsidiary operation," then the next question to be decided is whether that subsidiary operation is "vital," "essential" or "integral" to the core federal work.

However, if the Board decides that the agro activities and the attendant disputed positions do not constitute part of a "subsidiary operation," but rather are part of a single business operation, there will be no need to address the second question.

VII

According to the evidence, there is a daily ongoing intimate connection between the agro managers/assistant agro managers and the overall operation of the employer's country elevators as a going concern. This integration at the country elevators is emphasized by the managerial and budgetary process. The operational and managerial control of the overall day-to-day operation of the country elevators, including the agro activities, resides with the station manager. This includes the responsibility to set the operational budget for the entire station. Operational and budgetary changes deemed necessary to improve the performance of the overall operation are his domain. The station manager is evaluated on the basis of the performance of the combined grain and agro operation at the elevator.

This functional integration is equally discernable from the management of labour relations at the elevators in question. As indicated by Mr. Breakenridge, all employees are expected to work together at the elevator "as a team with one leader" to serve all of their clients' needs. All employees working in connection with the operation of a station (including agro managers and assistant agro managers) report to the same station manager. Although percentages vary from place to place, agro managers and assistant agro managers regularly work in grain handling during peak periods and when relieving employees. Their work assignment in this regard is directed by the station manager. According to the employer (see Exhibit 57), all employees, including agro managers and assistant agro managers, are equally subject to the same hours of work regulations under the Canada Labour Code.

Although in no way determinative of the constitutional question at hand, the operative labour relations policies, as exhibited above, nevertheless underscore the factual reality that the Pool operated with all the employees, including the agro personnel, at the elevator as an integrated functionally operational unit.

The involvement of agro managers and assistant agro managers in grain handling activities whenever it is required - and regularly during every peak season - demonstrates the common contribution and effort of all employees for the success of the country elevators.

Depending on the location, the involvement of agro managers and assistant agro managers in grain handling activities can be as high as 65%. On the basis of the information available, agro managers and assistant agro managers at all of the locations in question spend on average a minimum of 30% of their time on grain handling activities.

On the other hand, the involvement of station managers and grain managers in agro operations at some of the major stations demonstrates, in reverse, the functional

integration of both activities in the employer's business. This integration holds true, as well, for the employer's remaining country elevators (that is, the smaller elevators where there is less than \$750,000 of agro sales per year). Although there is no agro manager position in the majority of the country elevators, agro activities are nevertheless carried out there. According to Mr. Breakenridge, virtually all elevators sell agro products and each elevator manager is encouraged to market and sell as much agro product as possible.

Finally, at the time of the original application, market pressures dictated that the Pool's country elevators emphasize the "full service" aspect of their operational ability. In the circumstances of this case, this means that it was important for the Pool, as a company involved in grain handling, to make agro products and services available at its elevators in order to provide its clients with a full range of grain-related supplies and services at "one facility." Both facets of its country elevator operation were integrated and designed to assist and promote the other. This fact is illustrated by the earlier described production contract process implemented by country elevators to secure the delivery of grain by providing concessions with respect to the supply of agro products.

VIII

After assessing the country elevator operation "as a functioning unit," the Board is of the view that the positions of agro manager and assistant agro manager are functionally integrated in the day-to-day activities and operations of the country elevators and form part of the overall operation of the single federal work (that is, the country elevators) in the fashion envisioned by the Supreme Court in Ontario Hydro, supra.

As the Supreme Court of Canada stated in Ontario Hydro, *supra*, Parliament's declaration operates on the functional character of the work and is meant to cover the integrated activity carried on at the country elevators. Here the "normal and habitual" activities of agro managers and assistant agro managers are intimately related to the grain handling work done at the elevator.

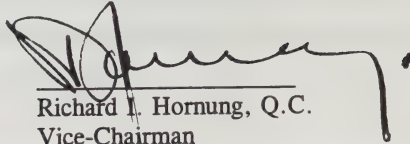
Although the employer attempted to describe the country elevator enterprise as consisting of essentially two separate grain and agro business operations, we are satisfied that in reality, considering all of the circumstances, there is only one business with two integrated activities being carried on as a sole functioning unit at the elevator locations concerned. Furthermore, the evidence convinces us that the functions of agro manager and assistant agro manager are all part of the integrated activities carried on in a single federal work - the country elevators - as a functioning unit.

The Board therefore concludes that the activities carried on at Alberta Wheat Pool country elevators by agro managers and assistant agro managers fall within federal jurisdiction.

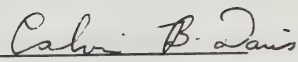
IX

Accordingly, the Board finds it appropriate, pursuant to section 27 of the Code, to include the positions of agro manager and assistant agro manager in the bargaining unit.

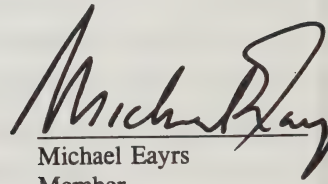
An appropriate order will issue.



Richard I. Hornung, Q.C.
Vice-Chairman



Calvin B. Davis
Member



Michael Eayrs
Member

information

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Summary

Jim Thompson, *complainant*, and Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, *respondent*, and United Parcel Service Canada Ltd., *employer*.

Board File: 745-4602

CCRT/CCRT Decision no. 1068
May 31, 1994

This is a complaint against the Union alleging that it breached its duty of fair representation under section 37 of the Code when it refused to bring to arbitration the termination grievance filed by the complainant.

After the Board heard a substantial amount of evidence concerning events that preceded the respondent union's conduct giving rise to the present complaint, it reiterated that its role is not to assess the correctness of the disciplinary action that led to the complainant's termination. The Board also confirmed that it does not fall under its jurisdiction to determine whether or not there was just cause for the termination.

Résumé

Jim Thompson, *plaignant*, et Section locale 91 du Syndicat des Teamsters (Teamsters, Chauffeurs, Warehousemen and Helpers), *intimée*, et United Parcel Service Canada Ltd., *employeur*.

Dossier du Conseil: 745-4602

CCRT/CLRB Décision n° 1068
le 31 mai 1994

Le plaignant dans cette affaire soutient que le syndicat a violé son devoir de représentation juste, prévu à l'article 37 du Code, lorsqu'il a refusé de porter à l'arbitrage son grief de congédiement.

Après avoir entendu de nombreux témoignages au sujet d'événements qui ont précédé la conduite du syndicat donnant ouverture à la plainte, le Conseil a rappelé que son rôle ne consiste pas à déterminer si les mesures disciplinaires qui ont mené au congédiement sont appropriées. Il a aussi réaffirmé qu'il ne lui incombe pas de déterminer si le congédiement est fondé ou non sur des motifs valables.



The evidence shows that the union did represent the complainant and that its decision not to pursue the termination grievance to arbitration is not contrary to the Code even if the complainant disagrees with the Union's appraisal of the merits of his grievance.

The complaint is therefore dismissed.

La preuve démontre que le syndicat a rempli son devoir de représentation et que sa décision de ne pas porter le grief de congédiement à l'arbitrage ne constitue pas une violation du Code, bien que le plaignant ne soit pas d'accord avec la façon dont le syndicat a évalué le bien-fondé du grief.

La plainte est donc rejetée.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE
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Reasons for decision

Jim Thompson,

complainant,

and

Teamsters, Chauffeurs, Warehousemen and
Helpers Local Union No. 91,

respondent,

and

United Parcel Service Canada Ltd.,

employer.

Board File: 745-4602

Decision no. 1068

May 31, 1994

The Board was composed of Jean L. Guilbeault, Q.C., Vice-Chair and Calvin B. Davis and Michael Eayrs, Members. A hearing was held on February 9 and 10, 1994, at Kingston.

Appearances

Mr. Jim Thompson, representing himself, accompanied by his wife;
Counsel Jamie Wyllie, accompanied by Basil Humphrys and by André R. Papineau,
for the Union and;
Counsel William J. McNaughton, for the employer.

These reasons for decision were written by Jean L. Guilbeault, Q.C., Vice-Chair.

Jim Thompson alleges that the Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91 (the Union) has breached its duty of fair representation and violated section 37 of the Code by declining to advance a grievance pertaining to the

termination of his employment. Section 37 reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The complainant worked as a driver for United Parcel Service Canada Ltd. (the employer; UPS or the company) out of its Kingston terminal for 11 years until his employment was terminated on February 2, 1993 for failure to report what his employer calls an "accident" that took place on January 13, 1993.

Mr. Thompson had delivered a parcel that day to the home of Ms. Lucille Goudreau at RR1, Elginburg, Ontario on Highway 38. The driving conditions were poor at the time due to a heavy snow storm in the region.

According to the complainant, when trying to regain access to the highway from the Goudreau's driveway, his truck became stuck in a heavy snow bank that had just been left on the shoulder of the highway by a snow plough, thus obstructing his way out of the lane way.

The complainant came back to the Goudreau's house to phone the UPS Kingston depot, but no one answered his call. He also tried to get assistance from Canadian Small Engines but no one was available to assist him in removing his truck from the snow bank. He then phoned Pat Rogers Towing Service which sent a tow truck that successfully freed his vehicle. The complainant was given, on the spot, an invoice for \$80.15 that he offered to pay at the time with his COD money. The driver, Joey Rogers, refused the cash payment stating that he had a running account with UPS and would bill UPS.

The complainant then signed the towing bill and drove back to the Kingston depot with the remaining parcels that he could not deliver due to the poor driving conditions.

The employer claims it first heard of the incident when it received the towing invoice by mail on January 27, 1993. Mr. Thompson's time card recorded no breakdown for January 13, 1993. No purchase order number had been issued for towing service.

The employer also suspected the complainant of attempting to falsify his time card and delivery records on the day in question.

According to the employer, a further investigation revealed that the operator of the tow truck had found the delivery car resting against a 4x4 post on the south side of the Goudreau's driveway. According to the employer, such an incident would meet the company's definition of an accident that requires an immediate report by the complainant in accordance with well established and known company rules. No damage to the body of the package truck was found.

The evidence shows that the complainant had a total of seven accidents prior to the January 13 incident, of which two occurred within the last 12 months and were classified as avoidable accidents. According to the employer, the January 13 incident would have been judged to be an avoidable accident and with three avoidable accidents during the last 12 months, the complainant was subject to termination of his employment.

In addition to those accidents, the complainant had also been disciplined, in the past, for failing to follow company procedures for securing his vehicle and for failing to properly record all packages he was dispatched with.

The complainant states that the morning following the accident, he informed his supervisor, Bill Dundon, that he had to retain the services of Pat Rogers Towing and that an invoice would eventually be forwarded to UPS. At the hearing, Bill Dundon did not recall being told that.

At a meeting held on February 2, 1993, the employer's representative, Mr. Fulk, confronted the complainant who was accompanied by union officers. After a lengthy discussion, he refused to accept the complainant's explanation and verbally terminated his employment on the spot; a letter of confirmation dated February 4, 1993 followed.

The complainant immediately filled out a grievance form claiming unjust dismissal and remitted it to an officer of the respondent union, Mr. Humphrys.

Having heard nothing further by March 5, the complainant wrote to the union outlining various articles of the collective agreement pertaining to the grievance procedure and requested a reply by March 17, 1993 indicating if they had been complied with.

By that time, the time limit to advance the grievance to arbitration had elapsed and Mr. Humphrys verbally requested the employer to extend the time limit.

The consistent position of the employer was that the complainant was not fired because he had a third avoidable accident within the last 12 months; he was fired as a direct result of failing to report an accident in accordance with company rules.

A formal grievance meeting was held on March 18, 1993. The union officers allege that, during that meeting, they presented their best case. Every aspect was explored, each party was given a chance to talk and no new information came out. There were

no changes to the previous reports discussed at the meeting of February 2, 1993. No settlement could be reached. The employer maintained its original decision with respect to Mr. Thompson's dismissal.

A legal opinion requested by the union in late March and received in May concluded that the grievance was not a winnable case at arbitration.

The complainant and his wife drove to Ottawa on May 4, 1993 and met with the union official, Mr. Humphrys. Although no appointment was arranged, a meeting that lasted about one hour took place. At that time, the complainant was told that he did not have a strong case and that his grievance would probably not go to arbitration.

Nevertheless, the union agreed to and did visit the site of the accident on May 7. The complainant was accompanied by a friend who became involved in the investigation. No new facts were found and once again the complainant was told his case was not a winnable case.

Finally, on May 21, a Friday, the matter was put before the Executive Board of the respondent union and after a lengthy discussion, a resolution was passed not to send the grievance to arbitration. No explanation was ever given to the complainant as to the rationale of the union's decision. Numerous phone calls and a lawyer's letter were not returned and/or answered in that respect.

A union has the discretion to decide whether or not to proceed to arbitration, and that discretion includes the right to make mistakes (see David Coull (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRB no. 957)).

During the hearing into this matter, the Board heard a substantial amount of evidence, some of which was contradictory, about the factual circumstances culminating in Mr. Thompson's dismissal. Unlike certain other types of unfair labour practice complaints (such as an allegation of employer disciplinary action against an employee for legitimate union organizing activity) the Board, in a case such as this, will usually only require a very limited amount of background information about events preceding the respondent union's conduct giving rise to the actual complaint before it. The Board does not assess the correctness of the disciplinary action, it is only concerned with the union's conduct on behalf of the affected member.

The Board's sole concern under section 37 is to ensure that the union's decision is not made in an arbitrary manner, is not motivated by bad faith and is not one in which the complainant was the victim of discrimination.

A complainant may very well disagree with his union's decision, but the Board is not to be considered as an appeal body from the union's decision.

In Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, the Supreme Court of Canada identified the fundamental principles of the duty of fair representation.

"1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence without serious or major negligence, and without hostility towards the employee."

(Pages 527; 654; and 12,188)

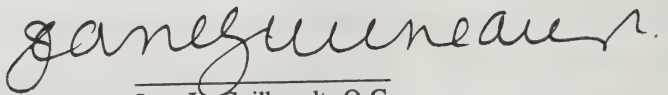
Conclusion

There may have been grounds for Mr. Thompson's disappointment with the manner in which the union officers have conducted this affair. Indeed communications were sometimes strained between the parties and the complainant may have felt from time to time an apparent indifference on the part of the respondent union but the evidence must be viewed in the global context of the case. Mr. Thompson unquestionably has a right to be properly represented by his union, particularly with respect to a grievance involving termination of his employment. He may disagree with the union's appraisal of the merits of his grievance, but, in the final analysis, his union did represent him; did consider the merits of his grievance; did obtain a legal opinion with respect to its chances of success at arbitration; brought the matter before its Executive Board and made a considered decision not to proceed to arbitration.

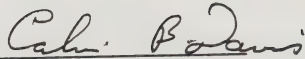
The Board, after giving careful attention to whether the union has demonstrated bad faith, arbitrariness or discrimination when deciding not to advance the grievance to arbitration, concludes that in all the circumstances of this case, the respondent union

did not breach its duty of fair representation.

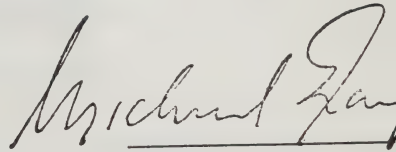
The complaint is therefore dismissed.



Jean L. Guilbeault, Q.C.
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

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Summary

Patrice Gravel, *complainant*, and Air Alma Inc., *employer*.

Board File: 745-4676

CCRT/CLRB Decision no. 1069
May 31, 1994

This case deals with a complaint concerning an unjust dismissal for union activities in violation of section 94(3)(a)(i) of the Code.

The employer tried to convince the Board that it had based its decision to dismiss the complainant solely on a series of professional errors. For his part, the complainant produced overwhelming evidence that the employer's decision was tainted with anti-union animus.

The Board does not hesitate, in the circumstances of this case, to conclude that the employer's conduct was contrary to the provisions of the Code and orders that the complainant be reinstated in his pilot position with no loss of seniority and be compensated for his losses from the date of his dismissal to his actual return to work.

Résumé

Patrice Gravel, *plaignant*, et Air Alma Inc., *employeur*.

Dossier du Conseil: 745-4676

CCRT/CLRB Décision n° 1069
le 31 mai 1994

Il s'agit d'une plainte de congédiement illégal pour cause d'activités syndicales selon le sous-alinéa 94(3)a)(i) du Code.

L'employeur a tenté de convaincre le Conseil que la décision de congédiement reposait exclusivement sur une série de fautes professionnelles de pilotage. Le plaignant de son côté a répondu par une preuve accablante démontrant l'existence de sentiment antisyndical chez l'employeur au moment de sa prise de décision concernant ce pilote.

Le Conseil n'a aucune hésitation dans les circonstances particulières de cette affaire à conclure que la conduite de l'employeur est contraire au Code et ordonne la réintégration du plaignant dans ses fonctions de pilote professionnel sans perte d'ancienneté et avec indemnité pour les pertes subies depuis la date de son congédiement jusqu'à la date effective de son retour au travail.



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Reasons for decision

Patrice Gravel,

complainant,

and

Air Alma Inc.,

employer.

Board File:
Decision no. 1069
May 31, 1994

745-4676

The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, as well as Mr. François Bastien and Ms. Véronique L. Marleau, Members. A hearing was held in Alma on April 18, 19, 21 and 22, 1994.

Appearances

Ms. Laure Lapierre, assisted by Mr. Denis Fréchette, for the complainant; and Mr. Serge C. Tremblay, assisted by Messrs. Jacques Simard and Bernard Théberge, for the employer.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, assisted by Mr. François Bastien and Ms. Véronique L. Marleau.

I

The Complaint

The Board has before it a complaint filed by Patrice Gravel, a professional pilot, alleging that Air Alma Inc., his employer, had dismissed him contrary to section 94(3)(a)(i) of the Code, which reads as follows:

"94. (3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."

At the hearing held in Alma, the reverse onus of proof applied, as stipulated in section 98(4) of the Code, which reads as follows:

"98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

Air Alma Inc. denied that the disciplinary action, namely pilot Patrice Gravel's dismissal, was in any way related to the complainant's union activities. On the contrary, as made clear throughout the hearing, it was a series of pilot errors, and these errors alone, that led to the dismissal.

The Board must therefore examine all the evidence to ensure that the employer's decision was in no way motivated by anti-union animus. Moreover, the employer must satisfy the Board that it had imposed the sanction strictly for business-related reasons.

II

The Facts

Patrice Gravel was hired as a pilot on March 20, 1989 and quickly became the captain of an Embraer 110 twin-engine turbo-prop aircraft used mainly to transport passengers between Alma, Roberval, Dorval, Chibougamau and Montréal.

He was first suspended on January 11, 1991 for seven days for authorizing a pilot trainee to take the controls of the E-110 in the left seat during a regular flight between Roberval and Alma. He was subsequently dismissed on April 12, 1991 for making serious technical errors while starting an engine.

Two months later, in June 1991, Patrice Gravel was nevertheless asked by Bernard Théberge, chief pilot of Air Alma Inc., at the express request of Jacques Simard, the company's general manager, to resume his employment, this time as co-pilot of a Lear Jet 24, and to resume his duties as captain of the E-110. He was also given responsibilities for training on the Embraer 110.

The months passed and, according to the employer, the situation began to deteriorate in the summer of 1992. The employer felt that, although Patrice Gravel was an excellent pilot, he developed flight practices that were contrary to existing practices and to the requirements of the operating manual. Mr. Gravel allegedly received various reprimands for these failings from chief pilot Théberge. In reply to questions from the Board regarding the nature of the criticisms or reprimands he allegedly made to his young pilot, Bernard Théberge pointed out in very general terms that they were comments, advice or instructions that appeared to be essentially of a technical or professional nature, and not discipline-related. The evidence revealed that, when informed that these practices were unacceptable, pilot Gravel stopped them immediately. However, the testimony suggested that the climate of co-operation, trust and uninhibited friendship between Patrice Gravel and his chief pilot gradually

deteriorated to the point where their conversations were confined to the strict requirements of their work.

The Board noted the obvious influence that Pierre Gravel exerted over the young pilots who made up the new generation of company employees and towards whom, moreover, as we noted above, he assumed responsibility for training at his employer's request. We should mention in this regard the testimony of the company's general manager who decided, in August 1993, to hire as a regular pilot and instructor a much more experienced pilot, Mr. McIntosh, to alleviate a number of problems, including the personality conflict between Patrice Gravel and his chief pilot.

It was in this atmosphere that the pilots met in mid-October to prepare the list of their concerns and needs. After considering meeting with the general manager to present this list to him and discuss with him corrective measures with him, the pilots dropped this option and chose instead to consult professional union organizations. It is likely on their advice that they opted for unionization and the more structured approach of collective bargaining.

The first decision the pilots took was to agree among themselves to ensure strict compliance with the Air Regulations. For example, at the beginning of November 1993, pilot Jean-François Carrier personally filed a complaint against his employer, Air Alma Inc., with Transport Canada concerning a crack in the outer part of the windshield. This crack made the aircraft, a Cessna 404, of which he was the captain, unfit for flights in icing conditions.

The incident that gave rise to this complaint occurred on Wednesday, November 10, 1993 and set off a chain of events that included Patrice Gravel's dismissal and, from all appearances, accelerated the signing up of members in the union and the filing of its application for certification with the Board.

Flight 1374

A daily link with Montréal is provided by flights 1373 (Alma-Roberval-Dorval) and 1374 (Dorval-Roberval-Alma). These flights take place toward the end of the afternoon. On Wednesday, November 10, 1993, the crew consisted of Patrice Gravel, captain, and Christian Punde, co-pilot. The aircraft, an Embraer 110, can accommodate 21 persons, according to the specifications of its Brazilian manufacturer. The airworthiness certificate, however, limits the number of passengers to 16 which, with the two crew members, brings the maximum number of persons who can travel aboard this aircraft to 18. However, the total take-off weight of the aircraft must not exceed 12 500 pounds. According to the testimony heard, flights carrying 16 passengers are the exception at Air Alma Inc. When this occurs, it appears to signal a potential excess take-off weight problem for the aircraft. However, no special procedure was in effect to monitor this problem, such as weighing the passengers and the baggage, as opposed to that of following the procedure generally suggested by the Air Regulations, i.e., using the estimated weight of 182 pounds for a man and 135 pounds for a woman.

Based on the factors involved and his own calculations, Pierre Gravel made it clear to Gordon Wood, manager of air traffic, and Christian Punde, his co-pilot, before the departure from Alma, that he would not pilot flight 1374 if there were 16 passengers, unless some of the baggage were left behind.

When informed of this situation, Jacques Simard contacted chief pilot Bernard Théberge, who was then in Montréal, and instructed him to check everything and ensure that flight 1374 left Dorval that evening.

The Board heard many witnesses concerning the captain's refusal to pilot his aircraft because he felt that it was overloaded. Although the versions differ, they revealed the following facts.

- When the flight arrived at Dorval around 6:00 p.m., Patrice Gravel and Bernard Théberge had a telephone conversation during which the pilot communicated to the chief pilot information on the data necessary to calculate the maximum weight of the aircraft. This conversation was limited to the bare essentials. The last words exchanged were the following:

Q: So you refuse to work the flight?

A: Yes, that's right. I'm refusing.

Q: Get your things and come and see me at the hotel.

- Bernard Théberge ordered Jeff McIntosh, then in Montréal as co-pilot aboard the Lear Jet 24, to go to Dorval and do what was necessary to ensure that the return flight to Alma proceeded normally and on time.
- At the airport, near the boarding gate, Jeff McIntosh and Patrice Gravel saw one another, but said very little to each other. From this very brief conversation, Mr. McIntosh recalled the following remark by the complainant: "Sometimes you do, sometimes you don't."
- Jeff McIntosh did the routine checks of the aircraft himself and noted that the aircraft had been fuelled.
- Jeff McIntosh took charge of the flight, departed with 16 passengers, flew under fuel-saving cruising conditions and arrived at his final destination, Alma, without incident.

It is not up to the Board to decide whether Patrice Gravel could have worked the flight in question without, the aircraft being overloaded. What the Board learned from the testimony of Messrs. Simard, Théberge and McIntosh is that final responsibility for this decision always rests with the captain and that no one should interfere. The

evidence revealed, moreover, that baggage exceeding the allowable weight had been refused before by other pilots without any action being taken against them.

Mr. Simard testified that he had decided to dismiss the complainant on Friday, November 12, 1993 following a telephone conversation with chief pilot Th  berge. But he did not convey this decision to the person affected, who was on call on the Saturday. The letter of dismissal dated November 12, 1993 was not given to Patrice Gravel until Tuesday, November 16, 1993.

The circumstances surrounding the writing of this letter and the explanation given for the delay in sending it to the complainant are still very unclear. No witness provided a complete explanation. One witness testified that the secretary was at fault. Mr. Th  berge testified that he had dictated a few lines, even though the dismissal letter consisted of five lines only. Finally, the difference in the dates was attributed to the wish that the letter bear the date on which the decision was made. Whatever the case may be, the general manager agreed that it was late in the afternoon on November 16, 1993 that this letter was given to the complainant.

However, at that specific point in time, the employer had in its possession the union's application for certification which it had received at 2:13 p.m. Moreover, the general manager met privately with pilot Jean-Fran  ois Carrier to discuss the Cessna 404 and the cracked windshield. He informed Mr. Carrier of the November 12, 1993 letter from the Cessna manufacturer and then subjected him to a flood of offensive and hostile remarks. The other pilots, including the complainant, met with the general manager toward the end of that afternoon, and the remarks he made to them concerning their decision to unionize were equally scornful and offensive, as is abundantly clear from the union's uncontradicted evidence.

The conduct of the general manager, who admitted, moreover, using "strong" language, and his choice of words in his remarks to his pilots, clearly indicate that anti-union animus was unmistakably present at that point, and despite the arguments of counsel for the employer, the Board cannot interpret this situation otherwise.

With regard to Patrice Gravel, whatever criticism one might now have of his conduct as a pilot, the evidence clearly revealed that, at the time in question, he never received verbal or written reprimands for these failings, even though, in hindsight, they were characterized as very serious. These facts, when added to all the circumstances that culminated in the dismissal, from the alleged misconduct of November 10, 1993 to the letter of dismissal sent late in the afternoon on November 16, 1993, clearly demonstrate that the decision to dismiss the complainant was motivated by anti-union animus. This conduct therefore contravenes the Code.

III

Interpreting the Law

Pursuant to the above-cited section 98(4) of the Code, the reverse onus of proof applies to the analysis of the evidence presented in a complaint of dismissal for union activities. To refute this presumption, the employer must show that the dismissal was in no way motivated by anti-union animus.

The interpretation of these provisions of the Code was examined thoroughly in National Pagette (1991), 85 di 1 (CLRB no. 862), at pages 9-10. In Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600), the Board decided this question unequivocally. Where the employer is unable to show, to the Board's satisfaction, that its decision was not influenced by the fact that the employee was about to exercise, or was exercising, a right conferred by the Code, the Board will find that this decision contravenes the Code. The reasons for dismissal may very well

be justified. Nevertheless, anti-union animus, even if only incidental to the decision to terminate an employee's employment, compromises the objectivity of this decision and makes the employer guilty of unfair labour practice.

Only disciplinary considerations, in the case of a dismissal, and administrative considerations, in the case of a lay-off, must therefore enter into the decision to terminate the services of an employee:

"... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act — e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is one contemplated by section 184(3) [now 94(3)], he will be found to have committed an unfair labour practice."

(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461)

(In addition to this decision, see also Larose-Paquette Autobus Inc. (1990), 83 di 175 (CLRB no. 840), for other relevant references.)

In this type of case, the employer must satisfy the Board that its actions were not intended to interfere with an employee's legitimate exercise of a right that is conferred on that employee by the Code and that the Board is required to protect (see Transport

Papineau Inc. (1990), 83 di 185 (CLRB no. 842)). This means that the Board must be satisfied that the reason for the dismissal or lay-off, as the case may be, even though valid, is not an excuse or pretence that conceals anti-union animus (see Les Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443)). Otherwise, the sanction, whether of a disciplinary or of an administrative nature, will be set aside because it contravenes the provisions of the Code (in the case of a dismissal, see Pierre Fiset (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473); and A & M Transport Limited (1983), 52 di 69 (CLRB no. 422); in the case of a lay-off, see Byers Transport Limited (1988), 75 di 164 (CLRB no. 7715); and Emery Worldwide (1990), 79 di 150 (CLRB no. 775)). If anti-union animus is not present, the complaint will be dismissed (in the case of a dismissal, see in particular Canpar (A Division of Canadian Pacific Express Limited) (1981), 43 di 169 (CLRB no. 305); and Amok Ltd. (1981), 43 di 282 (CLRB no. 314); in the case of a lay-off, see in particular Radio CKML Inc. (1982), 51 di 115 (CLRB no. 398); Canada Post Corporation (1985), 60 di 104 (CLRB no. 504); Québec Aviation Limitée (1985), 62 di 41 (CLRB no. 522); and Robin Hood Multifoods Inc. (1988), 76 di 1 (CLRB no. 718)).

Finally, this question of the validity of the reasons does not directly come under the Board's jurisdiction and is of interest only insofar as it reveals that anti-union animus was a factor in the decision-making process (see Verreault Navigation Inc. (1978), 24 di 227 (CLRB no. 134)).

IV Decision

In light of the facts established in this case, the Board concluded that Air Alma Inc. failed to discharge the reverse onus of proof it had concerning its decision to dismiss the complainant. As we pointed out earlier, the evasive reasons the employer gave to

explain the circumstances surrounding the dismissal, both in terms of its content and form, the clearly anti-union remarks heard, the attempt to settle its accounts with the union members, and the obvious coincidence between the point at which the employer learned that its employees were trying to unionize and the announcement to the complainant of his dismissal all constitute, in the Board's opinion, evidence that support the conclusion that section 94(3)(a)(i) of the Code was contravened in this case.

The employer's contravention of the Code requires remedial action. Section 99 gives the Board the power to order remedies. In the instant case, these remedies must be based on the following principle: the victim of the employer's contravention of the Code is entitled to "full redress." The employer shall therefore reinstate Patrice Gravel in his position with no loss of seniority. It shall also compensate him for the losses suffered since his dismissal, that is, for the period from November 16, 1993 to the effective date of his reinstatement.

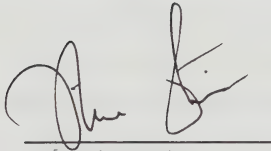
To this end, the Board designates Ms. Suzanne Pichette, Director of the Quebec Region, to assist the parties in implementing this order.

Pursuant to the powers conferred on it by section 20 of the Code, the Board shall remain seized of this matter in order to settle any question that may arise during implementation of this order, if necessary.

This is a unanimous decision.



Jean L. Guilbeault, Q.C.
Vice-Chairman



François Bastien
Member



Véronique L. Marleau
Member

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Summary

André Gingras, *complainant*, Canadian Brotherhood of Railway, Transport and General Workers, *respondent*, and VIA Rail Canada Inc., *employer*.

Board File: 745-4652
CCRT/CLRB Decision no. 1070
June 13, 1994

Résumé

André Gingras, *plaignant*, Fraternité canadienne des cheminots, employés des transports et autres ouvriers, *intimée*, et VIA Rail Canada Inc., *employeur*.

Dossier du Conseil: 745-4652
CCRT/CLRB Décision n° 1070
le 13 juin 1994

A VIA Rail employee alleged in this complaint that his union, the Canadian Brotherhood of Railway, Transport and General Workers, breached its duty of fair representation when it decided not to refer his dismissal grievance to arbitration. The respondent union argued for its part that it had based its decision to abandon the grievance on the complainant's precarious state of health at the time, as well as on the employer's verbal assurance that the complainant would be reinstated if he accepted to undergo the appropriate treatment. The union learned some months later that the employer refused to reinstate the complainant, even though he had complied with his obligations.

Un employé de VIA Rail allègue dans la présente plainte que son syndicat, la Fraternité canadienne des cheminots, employés des transports et autres ouvriers, a manqué à son devoir de représentation juste lorsqu'il a décidé de ne pas présenter son grief de congédiement à l'arbitrage. Le syndicat intimé prétend pour sa part que l'état de santé très précaire du plaignant à cette époque, de même que l'assurance verbale de l'employeur qu'il réintégrerait celui-ci s'il acceptait de suivre les traitements appropriés, sont les motifs de sa décision d'abandonner le grief. Le syndicat a appris quelques mois plus tard que l'employeur refusait de réintégrer le plaignant même si ce dernier avait rempli ses obligations.



The Board allowed the complaint on the grounds that the union was guilty of serious negligence when it decided to abandon the complainant's grievance without first obtaining in writing a commitment from the employer that the complainant would in fact be reinstated if he complied with his obligations. Among the factors considered by the Board and established in the jurisprudence we find the seriousness of the consequences of the breach, the experience of the union and its representative and their expertise in labour relations matters, especially with respect to the grievance procedure.

Le Conseil accueille la plainte au motif que le syndicat a fait preuve de négligence grave en acceptant de laisser tomber le grief du plaignant sans s'efforcer d'obtenir préalablement un engagement écrit de l'employeur que le plaignant serait effectivement réintégré s'il remplissait ses obligations. Au nombre des facteurs retenus par le Conseil et consacrés par la jurisprudence se trouvent la gravité des conséquences du manquement en cause, l'expérience du syndicat et du représentant syndical et leur expertise évidente en relations de travail, notamment en matière de procédure de règlement des griefs.

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Reasons for decision

André Gingras,

complainant,

and

Canadian Brotherhood of Railway, Transport
and General Workers,

respondent,

and

VIA Rail Canada Inc.,

employer.

Board File: 745-4652

Decision no. 1070

June 13, 1994

The Board was composed of Mr. J. Philippe Morneau, Vice-Chairman, as well as Mr. François Bastien and Ms. Véronique L. Marleau, Members. A hearing was held in Québec on March 17, 1994.

Appearances

Mr. François Leduc, for the complainant;

Mr. René Moreau, accompanied by Mr. Léo St-Louis, for the respondent.

These reasons for decision were written by Mr. François Bastien, Member.

The Board has before it a complaint of unfair labour practice filed by André Gingras on October 21, 1993 pursuant to section 97 of the Canada Labour Code. In his complaint, Mr. Gingras alleged that his union, the Canadian Brotherhood of Railway, Transport and General Workers (CBRT), had breached its duty of fair representation within the meaning of section 37 of the Code by refusing to refer to arbitration his dismissal grievance.

I

The facts that gave rise to this complaint are not contested. At the time of his dismissal, the complainant worked for VIA Rail Canada Inc. (VIA Rail). If his years of service that preceded the creation of VIA Rail are taken into account, Mr. Gingras had been working for this employer since June 25, 1964. He was dismissed on June 25, 1992 because he had accumulated 75 demerit points, the minimum number for dismissal being 60 points. All these points were accumulated between April 27, 1992, the date of the first incident, and June 25, 1992, the date of his dismissal. He was assessed all these points for drinking on the job and for being intoxicated during the investigation and disciplinary hearing into his drinking on the job.

More particularly, the complainant was summoned by the employer on June 12, 1992 to a hearing into two previous incidents during which he had allegedly drunk on the job. A few days later, on June 17, 1992, Mr. Gingras was summoned to another interview for being intoxicated on reporting for the June 12 hearing. At the conclusion of this interview, he was informed that he was being suspended without pay until the employer's decision was communicated to him. On June 22, 1992, he did not appear at a meeting to which he had been summoned and did not inform the employer of his absence. On June 25, 1992, he received from the employer a letter signed by Norbert Lenoir who informed him that he had accumulated more than 60 demerit points and was therefore dismissed.

Mr. Gingras wrote to his union on June 30, 1992 to ask it to grieve the employer's decision. On July 13, 1992, Andy S. Wepruk informed the employer's representative, Norbert Lenoir, that he was appealing this disciplinary action that resulted from the June 12 hearing at the second step in the grievance procedure, in accordance with article 24 of the collective agreement.

In the weeks preceding his dismissal, the complainant experienced many personal and marital problems that caused his health to deteriorate significantly, to the point where he had to be admitted urgently on August 8, 1992 to the St-François d'Assise Hospital in Québec, where he remained until the beginning of September 1992. He convalesced until October 9, 1992, and then underwent various forms of treatment until November 13, 1992.

On July 31, 1992, Léo St-Louis, CBRT's regional vice-president, attended a meeting at which the employer was represented by Mr. Lenoir and the manager of the Gare du Palais (train station), and the union by the Local representative, Mr. Labrecque. At the meeting, there was discussion in particular of Mr. Gingras's dismissal. During the discussion, Mr. St-Louis asked Mr. Lenoir if the company would agree to reinstate Mr. Gingras if he successfully underwent detoxification treatment. According to Mr. St-Louis's testimony, Mr. Lenoir gave him a firm commitment in this regard. During the same trip to Québec, Mr. St-Louis visited Mr. Gingras at his home. During this visit, he saw for himself Mr. Gingras's poor state of health and discussed with the complainant the need for him to receive treatment. Mr. St-Louis was then convinced, after talking with some of the complainant's fellow workers, that no one would come and testify on his behalf. Moreover, he was now convinced that Mr. Gingras clearly was in no condition to resume normal duties. It had become clear to him that detoxification treatment was the only possible option in the circumstances.

During this same visit, Mr. St-Louis and Mr. Labrecque, president of the grievance committee, agreed that they would not refer the grievance to arbitration. However, they also agreed not to inform the company of this decision. According to Mr. St-Louis, the reasoning behind this decision was as follows. The union had two options: either refer the grievance to arbitration, where it stood a good chance of succeeding, with the grievor thus being reinstated, but with a definite risk of a recurrence given his physical and mental health; or abandon the grievance and try to

obtain the complainant's reinstatement through the employer's discretionary detoxification program. In short, the union needed to buy time.

This was the situation on August 31, 1992 when Mr. St-Louis wrote to Mr. Lenoir to inform him of the discussions he had had with Mr. Gingras and of the ensuing events, in particular the complainant's hospitalization and his decision to enter a detoxification program under the care of Dr. André Marquis. Mr. St-Louis also asked the employer to extend the time limits relating to Mr. Gingras' grievance for the duration of his stay in hospital and of his treatment.

On September 8, the union was notified in a letter from Norbert Lenoir that its request for an extension had been denied. The Board deems it appropriate to quote this letter in full:

"Dear Sir:

This is in reply to your letter of August 31, 1992 concerning the dismissal of Mr. André Gingras.

As I stated during our telephone conversation, I unfortunately cannot agree to your request for an extension for the reasons that you give in your letter.

However, in accordance with our policy, we can consider the reinstatement of a dismissed employee 12 months following the date of dismissal. When this waiting period has expired, at CBRT's request, we can consider reinstatement provided written confirmation is obtained that the employee acknowledges his problem. The employee must have undertaken a detoxification program and also have participated regularly in a rehabilitation program such as A.A. When these conditions have been met, we can then consider reinstatement without compensation of pay and benefits.

Yours truly,

Norbert Lenoir
Director, Montréal Corridor"

(translation; emphasis added)

In his testimony, Mr. St-Louis admitted that he was very surprised by the company's decision not to extend the time limits because it was highly unusual for it not to agree to do so. He stated, moreover, that he considered that the part of the letter dealing with the company's detoxification program gave him the assurance he was looking for, namely, that the complainant could in fact resume his employment once the detoxification treatment was completed. In his opinion, this letter was confirmation of the verbal commitment he thought he had obtained from Mr. Lenoir at the July 31 meeting. With regard to subsequent events, it should be noted that Mr. St-Louis maintained regular contact with Mr. Charles-Yves Desrochers, the person responsible for following up Mr. Gingras's treatment, and with Mr. Lenoir, the employer's representative. Mr. Lenoir thus obtained regularly information on Mr. Gingras's state of health and progress.

On July 6, 1993, Mr. St-Louis sent Mr. Lenoir a letter in which he referred to reinstatement. He pointed out that Mr. Gingras was now sober; the documents required to support this opinion were also provided. On August 6, 1993, Mr. St-Louis consulted the complainant's fellow workers at the Gare du Palais to ascertain whether they wanted Mr. Gingras to resume work. At that point, moreover, he saw Mr. Gingras again and found him to be in excellent health. In his mind, there was nothing then standing in the way of the complainant's speedy reinstatement. On August 9, 1993, Mr. St-Louis wrote to Mr. Lenoir to give him this good news. Mr. Lenoir then confirmed, in his August 12 reply, VIA Rail's intention, announced earlier at a meeting between the two on July 27, to examine Mr. Gingras's case concurrently with that of Ms. Bernadette LeGoac, another VIA Rail employee dismissed for similar reasons. She had also filed a complaint with the Board alleging a breach of the duty of fair representation (file 745-4642).

On September 13, 1993, Mr. Lenoir wrote to Mr. St-Louis to inform him that, following an examination of the two files, it had been decided, in Mr. Gingras's case, not to reinstate him in the absence of sufficient evidence of his rehabilitation. Cuts to the operating budget were also cited. Mr. St-Louis was, to say the least, very astonished and surprised. The union, for its part, had met the employer's requirements for reinstatement and did not understand this change of heart. Mr. St-Louis admitted to the Board during his testimony that his mistake was in his having been naive. As a result of that decision, Mr. Gingras decided to file a complaint against his union with the Board.

II

Section 37 of the Code, which defines the bargaining agent's duty of fair representation, stipulates the following:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The interpretation of this section has given rise to ample precedent established by both the Board and its provincial counterparts (see Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRBR no. 304); André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRBR no. 319); and Donald McIntyre (1987), 72 di 127; 19 CLRBR (NS) 196; and 88 CLLC 16,002 (CLRBR no. 665)). The courts have also confirmed this right. The Supreme Court of Canada in particular set out in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, the following rules of conduct that a bargaining agent should follow:

"1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; 654; and 12,188)

It is appropriate to note here the relationship between the notions of arbitrariness and serious negligence. Whereas discrimination and bad faith imply, among other things, an element of intent, such is not the case with serious negligence. The authors of the treatise Droit du Travail define the nature of the semantic relationship between negligence and arbitrariness as follows:

"Arbitrariness closely resembles serious negligence and is often confused with it. It is present, for example, where the actions of the certified association have no objective or reasonable explanation: blind trust in information provided by the employer; lack of

consideration for the employee's arguments; or failure to determine whether they have any factual or even legal basis."

(Robert P. Gagnon et al., Collection de droit, Droit du Travail, Cahier de formation professionnelle du Barreau du Québec (École du Barreau, 1993), page 144; translation)

Moreover, this notion will always be evaluated in light of several factors that include the nature or seriousness of the grievance, the characteristics of the bargaining agent having regard to its resources, its level of expertise and, of course, its specific efforts to discharge its statutory duty of representation (see in this regard André Cloutier, supra, at pages 226-230; 338-341; and 698-701).

III

The Board's role in this case is therefore to determine whether, having regard to all facts and circumstances surrounding the respondent union's initiatives and actions in defending the complainant following his dismissal, this union's conduct meets the requirements of section 37, as these requirements are defined in the above-cited case law. More particularly, the Board must determine whether the union, in deciding to abandon the complainant's dismissal grievance, acted in an arbitrary or discriminatory manner or in bad faith within the meaning of section 37 of the Code.

The Board must make clear from the outset that the claim that the union acted in a discriminatory manner or in bad faith cannot be substantiated in the instant case. There is no evidence whatsoever that the union discriminated against the complainant. As for the element of bad faith, a simple glance at the evidence summarized above is sufficient to establish that the conduct of the responsible union official in this case, Léo St-Louis, is totally devoid of it. There remains the element of arbitrariness to

which are related the notions of competence and serious negligence cited earlier in Gagnon, supra.

In this regard, the only part of the union's conduct that is really at issue in the instant case is the one that concerns the period when Mr. St-Louis seeks to extend the time limits, is told by the employer representative, Mr. Lenoir that the request is denied, and then decides not to pursue the grievance. The complainant did not allege that the union had not fulfilled its obligations once the decision was made to abandon André Gingras's grievance. On the contrary, the allegation here is that the union's decision to abandon the complainant's grievance irreparably compromised his rights, as subsequent events showed. A more detailed analysis of this crucial aspect of the case is in order.

As Mr. St-Louis clearly pointed out, the union had no intention whatsoever of referring the complainant's grievance to arbitration for the simple reason that, even if the complainant had been reinstated subsequently by an arbitral award favourable to him, he was in no condition to perform his duties. In other words, his return to work was very risky and stood a chance to be followed immediately by another dismissal, this time with no realistic hope of an appeal. The Board has no authority to review this decision, which the union was fully entitled to make. Faced with this difficult situation, Mr. St-Louis, a prudent union representative, nevertheless decided first not to inform the employer of the decision not to refer the grievance to arbitration because it was a bargaining chip, and second to request formally an extension for lodging a grievance. This two-pronged initiative clearly showed that the union representative understood the importance of protecting the complainant's recourse, even though it had already been decided not to exercise it in the end.

What, then, did Mr. St-Louis do when, in a highly unusual step, Mr. Lenoir informed him in writing on September 8, 1992 that his request for an extension was denied? If he expressed surprise at the decision, he nevertheless remained convinced that the part

of Mr. Lenoir's letter dealing with the discretionary rehabilitation program confirmed Mr. Lenoir's verbal commitment to reinstate Mr. Gingras when the latter had completed his treatment. However, Mr. Lenoir's letter, which is cited earlier, says nothing of the kind. The words used are significant: "we can" and, later, we "can consider reinstatement" when certain conditions have been met. It is difficult to see in these vague promises the employer's firm commitment that Mr. St-Louis thought he had obtained from Mr. Lenoir on July 31, 1992.

Moreover, Mr. St-Louis did not speak to Mr. Lenoir about his letter of September 8, 1992 after he received it, either to ask for an explanation of his denial of the request for an extension, or to clarify the meaning of what Mr. St-Louis believed to be the agreement reached concerning the complainant's reinstatement. This seems surprising given the close contact that, according to Mr. St-Louis, he had maintained with his management counterpart during this period. In short, the union representative decided to rely, for his handling of the case on his belief that a verbal agreement had been reached, rather than seek clarification of a written statement that, at first glance, oddly seems not to resemble even remotely such an agreement.

Léo St-Louis will undoubtedly recognize that there was negligence in the instant case, to the extent that his inaction resulted in fact in the relinquishment of a right conferred by a collective agreement in return for a very uncertain promise of reinstatement, a decision which rested solely with the employer. This much at least can be construed from his admission to the Board that he had been naive. More particularly, this negligence consisted, not in the idea of foregoing arbitration, a very risky recourse in the circumstances, in return for genuine reinstatement following the detoxification treatment, but rather in ignoring the real possibility that the latter initiative might also prove to be equally illusive, given the language of Mr. Lenoir's letter which is, to say the least, ambiguous. There is, moreover, the refusal to extend the time limits, which was a clear sign of potential difficulty.

Is there nevertheless reason to conclude on the basis of these facts, that there was serious negligence within the meaning of section 37 of Code, as defined by the case law, and having regard in particular to the above principles? The Board, bearing in mind all circumstances involved, has to answer in the affirmative. At the time of the relevant events, Léo St-Louis was CBRT's regional vice-president. He is clearly an experienced union representative whose knowledge of labour relations in general and of the processing of grievances in particular cannot be called into question. He works for a well-established union which has long-standing procedures for processing grievances and which can readily distinguish between verbal and written communication in dispute resolution proceedings.

This negligence can also be characterized as serious because of its very significant impact on the complainant. He found himself unemployed some six years away from full retirement, even though he fulfilled his commitments, i.e., he successfully underwent rehabilitation. It was therefore important for the union representative to ensure from the outset that rehabilitation was the appropriate option, especially since the employer's reply of September 8, 1992 gave him serious reasons to question it. The union readily admitted that, before the complainant experienced the above-mentioned personal problems, he had a good employment record which would have been a real asset to him at arbitration or during the grievance procedure through the detoxification program. Obviously, the latter option could not be exercised because the request for an extension was denied, and the union did not then proceed to formalize what it believed to be a verbal agreement to reinstate the complainant. For all these reasons, the Board therefore allowed André Gingras's complaint and found that CBRT had contravened section 37 of the Canada Labour Code.

Sections 99(1)(b) and (2) of the Code define the Board's remedial powers as follows:

"99. (1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection

24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

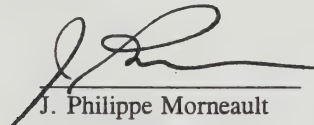
(b) in respect of a contravention of section 37, require a trade union to take and carry on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on the employee's behalf or ought to have assisted the employee to take and carry on;

...

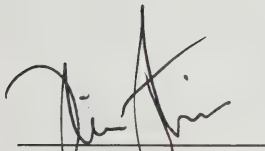
(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

The Board therefore orders CBRT to lodge, within 15 days of the date of this decision, André Gingras's dismissal grievance. To this end, the Board waives all time limits provided in the collective agreement entered into with VIA Rail. The Board designates Ms. Suzanne Pichette, director of the Board's office for the Quebec region, or any other labour relations officer she may designate, to assist the parties in implementing the present order.


This is a unanimous decision of the Board.



J. Philippe Morneau
Vice-Chairman



François Bastien
Member



Véronique L. Marleau
Member



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Summary

Syndicat des travailleurs de Radio Acadie (CJVA), *applicant*, and Radio Acadie Ltée (CJVA-AM) and Radio de la Baie Ltée (CKLE-FM), *respondents*.

Board Files: 560-296, 530-2308
CCRT/CLRB Decision no. 1071
June 17, 1994

Résumé

Syndicat des travailleurs de Radio Acadie (CJVA), *requérant*, et Radio Acadie Ltée (CJVA-AM) et Radio de la Baie Ltée (CKLE-FM), *intimées*.

Dossiers du Conseil: 560-296, 530-2308
CCRT/CLRB Décision n° 1071
le 17 juin 1994

Application for a declaration of single employer - review of existing bargaining units - Canada Labour Code (Part I - Industrial Relations) - Sections 18 and 35. Application granted.

The union filed a second application for a declaration to the effect that Radio Acadie Ltée and Radio de la Baie Ltée constituted a single employer pursuant to section 35 of the Code. It was thus requesting the Board to consolidate in one unit the bargaining units consisting of the employees who worked at both radio stations operated by the respondent companies. It cited the facts that had occurred since the decision in which the Board dismissed the union's first application filed under section 35 on the grounds that the evidence did not establish that the bargaining rights were being or could be undermined.

Single employer - common control and direction - associated and related companies - discretionary power - section 35. The Board examined the conditions needed to make a single employer declaration and concluded that they had been met. Moreover, the Board

Demande de déclaration d'employeur unique - révision des unités de négociation existantes - Code canadien du travail (Partie I - Relations du travail) - Articles 18 et 35. Demande accueillie.

Le syndicat a présenté pour la seconde fois une demande visant à faire déclarer que les sociétés Radio Acadie Ltée et Radio de la Baie Ltée constituent un employeur unique en vertu de l'article 35 du Code. Le syndicat voulait ainsi que le Conseil fusionne en une seule les unités de négociation des employés travaillant aux deux stations de radio exploitées par les sociétés intimées. Le syndicat invoquait la survenance de faits nouveaux depuis la décision du Conseil rejetant la première demande du syndicat présentée en vertu de l'article 35 au motif que la preuve ne démontrait pas que les droits de négociation étaient sapés ou risquaient de l'être.

Employeur unique - contrôle et direction en commun - entreprises associées et connexes - pouvoir discrétionnaire - article 35. Le Conseil examine les critères nécessaires en vue d'une déclaration d'employeur unique et conclut que ceux-ci sont toujours satisfaits. De

found that, in this case, a single employer declaration was appropriate. The evidence demonstrated that the commercial arrangements entered into by the respondent companies did not allow for healthy labour relations in view of the fact that they created an artificial partitioning between the employees on the grounds of corporate structure rather than on the basis of genuine employment relationships. However, the employers' good faith is not being questioned, since they have proved that they were not, via their commercial arrangements, trying to shirk the responsibilities provided for in the Code. The Board concluded that a valid labour relations purpose would be served by a single employer declaration because said declaration warranted a review of the existing bargaining structure via section 18 of the Code.

Employer in fact - section 16(p). The Board examined the situation from the perspective of the employer in fact. This examination confirmed the problems that came about with respect to labour relations because of the artificial partitioning between the "employers." The Board concluded that it is all the more appropriate to make a single employer declaration in this case where the evidence revealed so many common elements in the direction that it could have found that there is a single employer in fact rather than a multiplicity of employers within the meaning of section 35. It noted that if it were to act in such a fashion, it could use section 18 of the Code to review the existing bargaining structure without availing itself of section 35.

plus, le Conseil juge qu'en l'espèce, il est opportun de faire une déclaration d'employeur unique. La preuve révèle que les arrangements d'affaire entre les sociétés constituant l'employeur unique ne permettent pas l'établissement de bonnes relations de travail du fait qu'elles établissent un cloisonnement artificiel entre les employés en raison des enveloppes corporatives plutôt qu'en fonction des véritables liens d'emploi. La bonne foi des employeurs n'est toutefois pas mise en doute, ceux-ci ayant établi qu'ils ne cherchaient pas au moyen de leurs arrangements d'affaire à soustraire aux obligations qui leur incombent en vertu du Code. Le Conseil conclut qu'un objectif valable en matière de relations de travail serait servi par une déclaration d'employeur unique du fait qu'elle justifie une révision de la structure de négociation collective en place par le truchement de l'article 18 du Code.

Employeur de fait - alinéa 16p). Le Conseil analyse en outre la situation sous l'angle de l'employeur de fait. Cette analyse confirme les difficultés que présente, au plan des relations du travail, le maintien d'un cloisonnement artificiel entre les «employeurs». Le Conseil conclut qu'il est d'autant plus opportun de faire la déclaration d'employeur unique en l'espèce que la preuve révèle une telle unicité de gestion qu'il pourrait même à la limite constater l'existence d'un seul employeur dans les faits plutôt qu'une pluralité d'employeurs au sens de l'article 35. Le Conseil fait remarquer que, pour procéder de cette façon, il pourrait alors se prévaloir directement de l'article 18 du Code pour réviser la structure de négociation collective existante sans même avoir à recourir à l'article 35.

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Review of the existing bargaining units - section 18. The Board decided that the two bargaining units were no longer appropriate for collective bargaining. The employees concerned share many interests, and several factors favour the creation of a single unit. On the whole, Board policy favours collective bargaining resting on as broad a basis as possible; up until the certification of the unit consisting of employees who worked at the CKLE station (Radio de la Baie), one single collective agreement has always applied to both groups of employees. Furthermore, the picture drawn of the situation established that in the instant case, the changes made to the bargaining structure established by the parties in the past gave rise to the current impasse at the bargaining table. The Board decided that one single unit consisting of the employees in the bargaining units at CKLE and CJVA would from now on be appropriate.

Collective bargaining system - finality. However, the Board noted that some of the problems raised by the union to argue that the bargaining structure was no longer adequate were problems which related to compliance with the collective agreement or problems related to bargaining as such. Those types of problems do not warrant a review of the bargaining structure. In this regard, the Board reiterated that the bargaining system must be considered according to its function and that the bargaining structure is a means and not an end in itself.

Révision des unités de négociation existantes - article 18. Le Conseil décide que les deux unités de négociation ne sont plus habiles à négocier collectivement. Les employés visés ont beaucoup d'intérêts en commun et plusieurs facteurs militent en faveur de l'établissement d'une seule unité. Globalement, la politique du Conseil favorise la négociation collective reposant sur des bases aussi larges que possibles et jusqu'à l'accréditation de l'unité regroupant les employés travaillant à la station CKLE (Radio de la Baie), une seule convention collective a toujours été applicable aux deux groupes d'employés. En outre, le portrait tracé de la situation établit qu'en l'espèce, la remise en question de la structure de négociation mise en place par les parties dans le passé est à l'origine de leur impasse actuelle à la table de négociation. Le Conseil décide qu'une seule unité réunissant les employés des unités de négociation des stations CKLE et CJVA est désormais habile à négocier.

Régime de négociation collective - finalité. Dans le cadre de cette détermination, le Conseil souligne toutefois que certains des problèmes évoqués par le syndicat pour affirmer que la structure n'était plus adéquate sont des problèmes reliés au respect de la convention collective ou encore des problèmes de négociation à proprement parler. Partant, ce sont des problèmes qui ne justifient pas une révision de la structure de négociation. À cet égard, le Conseil rappelle que le régime de négociation doit être jugé d'après sa fonction et que la structure de négociation est un moyen et non une fin en soi.

Reasons for decision

Syndicat des travailleurs de Radio Acadie
(CJVA),

applicant,

and

Radio Acadie Ltée, CJVA-AM, and Radio de la
Baie Ltée, CKLE-FM,

respondents.

Board File: 560-296
Decision no. 1071
June 17, 1994

The Board was composed of Mr. J. Philippe Morneault, Vice-Chairman, as well as Mr. Robert Cadieux and Ms. Véronique L. Marleau, Members. A hearing was held on October 20 and 21, 1993 at Québec and on February 8 and 9, 1994 at Bathurst.

Appearances

Mr. Clément Groleau, accompanied by Mr. Claude Girard, union advisor, for the applicant;

Mr. Pierre Jolin, accompanied by Mr. Armand Roussy, for the respondents.

These reasons for decision were written by Ms. Véronique L. Marleau, Member.

I

The Application

The Board has before it for a second time an application filed by the Syndicat des travailleurs de Radio Acadie (the union) seeking a declaration that Radio de la Baie Ltée (CKLE-FM) and Radio Acadie Ltée (CJVA-AM) constitute a single employer under section 35 of the Canada Labour Code. This section reads as follows:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

II

The Proceedings

The union's application has been the subject of a number of proceedings that have culminated in this decision. For a clear understanding of the case, a brief review of these proceedings is in order.

On August 5, 1992, the union filed a first application with the Board under section 35 of the Code for a declaration that Radio Acadie Ltée (CJVA-AM) and Radio de la Baie Ltée (CKLE-FM) constituted a single employer for all purposes of Part I of the Code (file 560-286). On December 2, 1992, the Board dismissed the application because, even though it had concluded that the requirements for making a declaration of single employer had been met, it did not deem it appropriate to make this declaration in the circumstances:

"The Code encourages the practise of free collective bargaining. Where an application for a declaration of single employer is before the Board, the Board believes that it must review the bargaining structures only where remedial action is appropriate.

However, in light of the evidence on file, there is no reason, from the standpoint of labour relations, that would enable the Board to conclude that it is necessary, in the present case, to apply section 35 which, as we have stated before, is a remedial provision enacted

to protect the rights conferred by the Code. The Board does not see what purpose would be served at this time in making an order under section 35."

(Radio Acadie Ltée et autre, December 2, 1992 (LD 1091), page 7; translation)

On April 15, 1993, the union filed a second application with the Board, this time under sections 18 and 35 of the Code, for review of the December 2, 1992 decision and hence for the declaration denied at that time. The union wanted the Board to merge the two existing bargaining units so that the employees of Radio Acadie Ltée and Radio de la Baie Ltée would belong to a single unit. To justify the application for review and its late filing, the union cited new facts that had recently come to light. Section 18 of the Code reads as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

A summit panel comprised of Mr. J.F.W. Weatherill, Chairman, and Messrs. Serge Brault and Jean L. Guilbeault, Q.C., Vice-Chairmen, examined summarily the union's application for review and issued an interim decision on June 16, 1993 (Radio Acadie Ltée et autre, June 16, 1993 (LD 1168)). It held that some allegations contained in the application were outside the scope of an application for review because they relied on facts pertaining to events that occurred subsequent to the original panel's decision. For this reason, the summit panel decided that the union's review application should be treated as a new section 35 application:

"After examining the file, the Board concluded, however, that this application is not of the type contemplated by section 37(2) of the Regulations. The summit panel noted instead that some allegations contained in the application rely on facts pertaining to events that occurred subsequent to the original panel's decision. These allegations are thus outside the scope of an application for review

of the type contemplated by section 37(2). These allegations constitute, strictly speaking, a new initial application that goes beyond, at least according to its allegations, the evidence and arguments already presented. It is not therefore possible to dispose of this application without a Board officer first conducting an investigation, as is the case with any other application for a declaration of single employer."

(LD 1168, supra, page 2; translation)

It is against this background that hearings took place on October 20 and 21, 1993 and February 8 and 9, 1994, following the completion of the new investigation ordered by the summit panel "in particular into the events that occurred subsequent to the investigation that led to the December 2, 1992 decision" (LD 1168, supra, page 3; translation) and following the consolidation and filing of the documents received by the Board since the proceedings began.

III

The Facts

A. The Background

Radio Acadie Ltée operates radio station CJVA-AM in Caraquet, New Brunswick. Incorporated in 1973, Radio Acadie obtained from the Canadian Radio-television and Telecommunications Commission (CRTC) in 1975 the licence to operate a local francophone broadcasting enterprise on the AM band. Station CJVA-AM has been in operation since then.

A few years later, upon learning of negotiations among competitors with a view to entering the market, the shareholders decided, in order to protect CJVA, to apply for another operating licence from the CRTC. Thus, in 1985, Radio Acadie applied to

the CRTC for another licence. To this end, Radio Acadie's shareholders expanded its corporate structure by establishing an affiliate, Radio de la Baie Ltée. For reasons of their own, the shareholders deemed it preferable that a separate legal entity be responsible for the new broadcasting licence, which would cover the operation of a regional francophone broadcasting enterprise on the FM band.

Following various events, the operating licence sought for CKLE-FM was finally issued to Radio la Baie in 1987. At the same time, the CRTC also granted a licence to a competitor to operate a community francophone radio station on the FM band (CKRO). This new station would quickly make a name for itself and provide CJVA-AM with serious competition.

B. The Operation of the Stations

Station CKLE-FM began broadcasting in March 1990, following a slight delay owing to certain technical problems that necessitated changing the broadcasting slot. With regard to the operation of the two stations, Mr. Alie LeBouthillier, one of Radio Acadie's three shareholders and Vice-president of the two companies, explained that provision was made for each station to have its own announcers, and its own news department, in order to allow each station to develop its own image. It was agreed, however, that programming and administration for the two stations would be carried out by CJVA staff. This, moreover, was in keeping with the operating terms and conditions of CKLE specified in the documents pertaining to the licence granted by the CRTC:

"At the hearing, the applicant stressed that the regional character of the new station would in particular be reflected in its news and public affairs programming. In addition to the existing CJVA news staff, the station will employ a full-time reporter in Bathurst and one in Campbellton. An additional Bathurst reporter will be hired in the second year of operation as well as correspondents in Dalhousie,

Balmoral, Belledune, Shippagan, Tradacie, Néguaac and the Miramichi region."

(CRTC licence no. 87-576, July 20, 1987, page 11)

When CKLE began broadcasting on March 29, 1990, the administrative support staff and reporters who worked for Radio Acadie were therefore also working for Radio de la Baie (CKLE-FM), in accordance with article 7.01.07 of the collective agreement that bound the parties at the time:

"7.01.07

(a) As soon as Radio de la Baie Ltée (CKLE) begins broadcasting, employees of Radio Acadie Ltée (CJVA) occupying the positions of receptionist, script writer, accounting clerk and reporter can do the same work at Radio de la Baie (CKLE).

(b) As for the other functions necessary to broadcast, the Employer will hire the number of regular full-time employees and regular part-time employees required to operate the station.

(c) After this personnel is hired, the provisions of the collective agreement will apply.

(d) If the Employer decides to create a new position outside the existing job classifications, the parties will meet to discuss and agree on the terms and conditions of this position."

(translation)

Moreover, initially CJVA and CKLE were located on the same premises in Caraquet, in the building housing Radio Acadie which belongs to Rufino Landry, president of Radio Acadie and Radio de la Baie. Mr. Rufino is also the principal shareholder in a numbered company that holds more than a third of the shares of Radio Acadie.

A few months later, explained Armand Roussy, general manager of the two stations, CKLE had captured the radio audience in Bathurst. The company therefore moved

the station to Bathurst, where a number of employees were then transferred. Mr. Roussy stated that CKLE has since become autonomous and, as evidence of this, he cited the fact that CKLE has its own services and radio audience. Mr. Roussy admitted, however, that this autonomy does not extend to certain services such as accounting, which continue to be provided by CJVA employees in Caraquet.

Mr. Roussy has been an employee of CJVA since the end of November 1988 and has managed the two stations since then. In that capacity, he is responsible for both hiring and supervising the personnel at both stations. To this end, he spends about two days a week in Bathurst and even stated that, for some time now, he has been making almost daily visits there. In addition, he is the one who, together with Rufino Landry, determines the employees' terms and conditions of employment. Moreover, he is the spokesperson for both companies at the bargaining table. To assist him in his duties, Mr. Roussy acquired the services of Mr. Gilles Degrâce who, from 1990 to 1993, occupied the positions of manager of CKLE and salesperson. In fact, however, he has sometimes handled matters affecting CJVA employees, although to a much lesser degree. Today, Mr. Degrâce works at CKLE mainly as salesperson and secondarily as a freelance responsible for the sports report.

Since CKLE began operations, it has also been established that there is considerable interchangeability of duties between the employees of the two stations. Although seven persons work at CJVA and eight at CKLE, in fact some of these employees, excluding the program hosts, are required from time to time to work at the other station on the basis of "mutual exchanges of services." These assignments do not entail any bookkeeping, unless they become permanent.

C. The Financial Situation of the Stations

Since the advent of CKRO-FM, CJVA-AM has lost part of its clientele and has had serious problems making its operations profitable. The recession has not helped, nor have a number of other factors such as the station's signal which is very weak in the evening, thus making it difficult to receive. Employer witnesses testified, for example, that after the first quarter of the 1993 fiscal year, CJVA's revenues fell some 30%. This decline mirrored Radio Acadie's 40% decline in revenues in the last four years. This situation forced management to take certain steps to rationalize the station's activities. Of the three possible scenarios open to it (the closing of CJVA, its automation or its conversion to a station operated according to the "network" formula), the company chose the second. Mr. Roussy explained in this regard that this was the only viable option that would ensure the station's short- and medium-term survival. But this solution also implied a restructuring of the station and, as a consequence, the rationalization of personnel and of some of their terms and conditions of employment.

The recovery plan for CJVA called for the station to use CKLE's news department and hence the abolition of CJVA's news department (which meant doing away with the position of reporter and the NTR service). It also called for separate accounting for each station, in particular to eliminate certain time extensions in billing CKLE, reduce pay-related correspondence between stations, and ensure "complete separation in keeping with the CLRB's decision". These changes would result in abolishing the position of full-time accountant, introducing the biweekly pay system, and hiring a term employee to do the accounting. The plan also called for the abolition of the position of secretary-receptionist and the hiring of a replacement to perform this duty a few weeks of the year. Finally, the recovery plan also provided for changes to the duties and terms and conditions of employment of the program hosts, in particular through the introduction of a split schedule and the hosts assuming responsibility for the record library and local sports.

As might be expected, the new measures introduced at CJVA by management, through a restructuring plan of which the union was informed in April 1993, were not well received by those principally affected.

As for CKLE, Mr. Roussy testified that there was never any question of closing it. Even though this station's financial health was not very sound either, CKLE was in better shape than CJVA because it has no direct competition.

D. Labour Relations at the Stations

The union represents all employees whom it seeks to include in a single bargaining unit, namely, all employees of Radio Acadie (CJVA) and Radio de la Baie (CKLE), excluding the manager and salespersons. It has been certified to represent the employees of Radio Acadie since April 24, 1979, when the Board issued it a certification certificate to represent a unit consisting of employees of CJVA.

In March 1989, the employer voluntarily recognized the union as bargaining agent for a similar unit of employees of Radio de la Baie Ltée (CKLE-FM), following an agreement reached between CJVA and the union on November 28, 1989 with the help of a Labour Canada conciliator. This agreement provided for the concluding of a single collective agreement covering these two groups of employees.

Thus, since March 1989, the parties have signed and administered a single collective agreement. This collective agreement came into force on April 1, 1989 and expired on March 31, 1992. It was then renewed for another year, until March 31, 1993, still covering both groups of employees. It expired on that date.

On July 31, 1992, five days before it filed its initial application for a declaration of single employer, the union filed a second application for certification to represent a bargaining unit composed of the group of employees working at CKLE. On

November 9, 1992, the Board granted the union's application and certified it to represent a unit comprising:

"all employees of Radio de la Baie Ltée (CKLE-FM), excluding manager and salespersons."

On December 2, 1992, the Board issued the above-cited decision in which it dismissed the union's application for a declaration of single employer.

The parties then entered into negotiations with a view to renewing the collective agreement. However, since the granting of the certification in respect of the employees of CKLE and the Board's decision of December 2, 1992, the parties have differed over the number of collective agreements to be negotiated. At a pre-bargaining meeting with Mrs. Sandra Landry, union vice-president, Mr. Roussy informed the union of the stations' intention to negotiate separate collective agreements for the two groups of employees (CKLE and CJVA).

Then, on March 9, 1993, the union sent Radio Acadie and Radio de la Baie notice to bargain to initiate the bargaining process with a view to renewing the collective agreement. In this notice, in which Claude Girard, union advisor, suggested to the stations that a bargaining session be held on April 28, 1993, the union made the following clear:

"Moreover, despite the Board's decisions, our union wishes to inform you of its intention to negotiate a single collective agreement, this being a requirement for bargaining."

(translation)

On March 25, 1993, Mr. Roussy replied to Mr. Girard that the employers were prepared to bargain, but starting with CKLE-FM, and that their meeting the union's requirement of negotiating a single collective agreement was out of the question:

"I can tell you right away that we will not meet your requirement. We will negotiate separately for the two units because, as the CLRB has stated, our two stations constitute two separate entities."

(translation)

In that same letter, Mr. Roussy also informed the union that it would shortly be receiving a plan for restructuring CJVA that would be implemented very soon, in order to "reorient the radio station to better reflect the new reality of current market conditions".

On April 5, 1993, Mr. Roussy sent Mr. Girard official notice of the plan to restructure CJVA-AM. The same day, he also sent Mr. Girard a notice, in accordance with article 7.02 of the collective agreement, to the effect that positions would be cut at CJVA-AM for serious economic reasons:

"We must proceed with these lay-offs because CJVA-AM's revenues are inadequate to meet its present obligations, because no improvement is foreseeable and because our financial institution does not wish to support us any longer in these circumstances."

(translation; emphasis in the original)

On April 6, 1993, Mr. Girard replied to Mr. Roussy's letter of March 25 and again informed him of the union's intention to negotiate a single collective agreement for the two units that had been represented by the same union and governed by the same collective agreement for the past four years.

On April 12, 1993, Mr. Roussy replied to Mr. Girard that the employers' position concerning negotiating the collective agreement remained unchanged:

"... We wish to bargain for the two stations, CJVA and CKLE, separately.

This approach is not intended to deny our employees their right to bargain or to shirk our responsibility to negotiate a collective agreement with them.

These are quite simply different radio stations because they have a different background, method of operating and technology. We cannot approach both stations in the same way because one is expanding and the other is recovering in order to avoid, if possible, having to close.

Your persistence in wanting to negotiate for the two stations simultaneously can only be harmful, time-consuming and costly for everyone. This is really not what is needed right now..."

(translation)

On April 13, 1993, Mr. Girard sent Mr. Roussy a copy of the changes that the union was proposing for the renewal of the collective agreement.

Finally, three days later, the union filed with the Board the application for review of its December 2, 1992 decision which is the subject of these proceedings. In support of its application, the union cited new facts that had come to light since December 2, 1992 and that warranted the Board's reviewing its decision. In the union's opinion, the employers' refusal to bargain comprehensively and their decision to implement the recovery plan at CJVA, events that had occurred since the Board's decision of December 2, 1992, now more than warranted the Board's intervention.

IV

The Positions of the Parties

A - The Union

The union argued that the employers were using the economic situation and the Board's decision of December 2, 1992, in which it dismissed the application for a declaration of single employer, as excuses not to negotiate. It felt that, since the Board's decision, the employers had tried to destroy the union's right to collective bargaining. To this end, they were using the excuse of the economic situation to restructure thoroughly the way the radio stations were managed by giving priority to the "network" formula, the employees' versatility and the use of new technologies. The effect of all this was to undermine the employees' rights with respect to their working conditions as a whole (bumping, pay, etc.).

According to the union, this attitude was evidence of the employers' bad faith bargaining, and their decision to restructure CJVA, through the merging of certain operations of the two stations and the altering of the employees' duties and terms and conditions of employment, was contrary to section 50 of the Code. In the circumstances, it was abundantly clear that the employers were trying to use the fact that they were separate legal entities to destroy the employees' bargaining rights, avoid their obligations under the Code and free themselves from the effects of a collective agreement. All this could only confirm the appropriateness of the Board's intervention in this case through the exercise of its remedial power under section 35 of the Code:

"Through the filing of the recovery plan and its refusal to negotiate comprehensively, the employer is trying to destabilize the union by exerting undue pressure on the employees of CJVA-AM.

The employer is using the fact that there are two separate entities within the meaning of the federal Code to destroy the collective bargaining right which the union acquired in March 1989 and to try and free itself from the effects of the collective agreement in force between the parties.

Indeed, since March 1989, the employees of CKLE-FM and CJVA-AM have been covered and governed by the same terms and conditions with respect to work, pay, vacations, designated paid holidays, sick leave and more particularly the right of bumping and promotion in the event of a lay-off at one or the other of the stations.

Moreover, fragmenting bargaining units creates needless obstacles to bargaining and seriously limits the mobility of the employees who do similar work in order to prevent industrial peace from deteriorating.

While the employer is giving priority to the 'network' format, greater versatility and merging certain operations of CJVA and CKLE, it is using the fact that it consists of two separate legal entities to refuse to negotiate with the certified bargaining agent and is trying to free itself from the effects of the collective agreement in force between the parties. The Canada Labour Relations Board must therefore intervene by reviewing its letter decision of December 2, 1992 and declaring that the two employers, who have common control and direction of the two stations, constitute a single work, undertaking or business and that these employers themselves constitute a single employer."

(union's application of April 15, 1993, page 7; translation)

B - The Respondents

In their reply, the respondents admitted that, to date, only one collective agreement has been signed, but argued that it has always clearly been the "employer's" understanding that this situation was purely temporary and resulted from the fact that the "employer" had no alternative but to accept the union's demand for the FM station to be able to begin broadcasting. The respondents added the following:

"It is totally incorrect to claim that the existence of two collective agreements would create chaos that would destabilize labour relations in the circumstances. In fact, the distance between the two radio stations, one located in Bathurst and the other in Caraquet, is such that the employees have no relationship with one another and that any relationship they might have through a collective agreement is purely artificial. Moreover, the sole objective of certain employees is to ensure that, should the financial situation of Radio Acadie Ltée (CJVA) continue to deteriorate as a result of the ongoing decline in the AM radio audience, which is, moreover, a national trend, they will have a way out by going and bumping employees at Radio de la Baie (CKLE). This situation would have disastrous consequences for Radio de la Baie (CKLE) given the weak market and the different requirements for the program hosts at each station.

Moreover, since each station is evolving in a completely different work environment, there must be different collective agreements containing clauses adapted to the needs of each from many aspects. The representatives of Radio de la Baie Ltée (CKLE) were not aware of this situation when the first collective agreement was signed and they quickly realized it as soon as Radio de la Baie began broadcasting. As a result, in day-to-day operations, the same collective agreement has not been applied in the same way at the two stations. It is now essential that Radio de la Baie Ltée (CKLE), which is a distinct work environment, have a collective agreement that reflects the needs of the employer and its employees, having regard to the geographic location, the work environment and the different needs this station must meet."

(respondents' submissions of July 28, 1993 concerning the application for review of the Board's letter decision no. 1168, page 4; translation)

V

The Decision

The union is asking the Board to make the following determination:

"1. Allow this application;

2. review the letter decision of December 2, 1992 and declare that the employers are a single work, undertaking or business and that these employers constitute a single employer;

3. certify the applicant in respect of the following bargaining unit: 'all employees of Radio de la Baie Limitée (CKLE) and of Radio Acadie Limitée (CJVA), excluding director/manager, manager and salespersons';

4. order Radio Acadie Limitée (CJVA-AM) to stay the application of the terms and conditions of employment of the program hosts and lay-offs for all employees;

5. make any order the Board may deem appropriate;

6. hold a hearing so that the applicant can be heard on the allegations or any allegations it considers appropriate."

(union's application of April 15, 1993, page 9; translation)

We will examine the various aspects of this application, based on the evidence on file, having regard to the applicable principles of law.

A. The Application for a Declaration of Single Employer

Before considering the question of whether it is appropriate to make a declaration of single employer in the instant case, the Board must find that the five criteria governing the application of section 35 have been met. There must first be:

"1. two or more enterprises, i.e., businesses,

2. under federal jurisdiction,

3. associated or related,

4. of which at least two, but not necessarily all, are employers (Emde Trucking Ltd., supra),

5. the said businesses being operated by employers having common direction or control over them."

(Murray Hill Limousine Service Ltd. et al. (1988), 74 di 127 (CLRb no. 699), page 145; emphasis added in the original)

1. The Requirements for a Declaration of Single Employer

In its December 2, 1992 decision, the Board concluded that these five criteria had easily been met. At the hearing in these proceedings, counsel for the union argued that the evidence clearly showed that the situation had not changed in this regard. Counsel for the respondents, for his part, took the position that the two entities were now completely distinct and separate from one another and argued that the evidence clearly showed that the respondents did not want to operate a single business.

Thus, the only criteria that are at issue, are whether the businesses are associated or related and whether they are operated by employers having common direction or control over them. A thorough analysis of the factual situation in this case leads the Board to reaffirm its initial finding in this regard.

In determining whether the businesses in question are "associated or related," the Board considers the degree of interdependence of the operations of these businesses and, to this end, it considers in particular the similarity and integration of their operations. In the instant case, the Board conducted this exercise, and after considering the operations of Radio Acadie and of Radio de la Baie, concluded that there was still interdependence in terms of the operation of the two broadcasting enterprises and that the degree of interdependence was significant enough to conclude that these businesses were both associated and related.

Clearly, Radio Acadie and Radio de la Baie operate in the same sector, and even if one of the radio stations transmits on the AM band and the other on the FM band, their operations are nonetheless interdependent. The evidence shows that they pool a large part of their resources in order to maximize the profitability of each station.

These operations are part of a horizontally integrated process whereby one station provides the other with services through what can be termed a "mutual exchange of services." Services and equipment continue to be shared regularly and frequently, and perhaps even more so today. We need only mention, for example, the news report prepared at CKLE that is rebroadcast by CJVA, or accounting services which are provided at the two stations. In fact, even though, in the wake of the restructuring of CJVA, accounting services are now provided at each station, whereas previously accounting work for the two stations was done entirely at CJVA, the fact remains that the two stations are offered the same services that are co-ordinated on the same basis, by the same person.

On the issue of common control or direction, the Board also concludes that this criterion is still easily being met. This remains true in terms of both direction, which involves direct or immediate control relating to day-to-day control, and control in the broad sense of the term, which refers to the notion of fundamental control (see Air Canada et al. (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRBR no. 771), pages 117; 14,097; and 269). In The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRBR no. 60), the Board explained what it meant by "common control or direction":

"An indication of the fact that the enterprises are related is not necessarily decisive. Two or more enterprises may have common shareholders and the ownership of the assets may be held in common. However, the companies themselves may function as distinct, autonomous units. A more decisive test is the extent of common direction or control. The Board does not require total commonality of control in that all the enterprises are controlled by the same group of individuals. There may very well be a breakdown of functions whereby different persons have different responsibilities and play different roles in each of the companies involved or possibly no role at all in one or more of the companies. If it is established, however, that the policies of the various enterprises are closely co-ordinated, integrated and subject to joint direction, even

though the individuals are not directly tied to all of the companies involved, this would appear to show common direction and control. "

(pages 45; 359; and 441)

There is no doubt that, in the instant case, Radio de la Baie is in all respects subject to both the direction and control of Radio Acadie (see Murray Hill Limousine Service Ltd. et al., supra; Transport Route Canada Inc. et al. (1987), 70 di 153; and 17 CLRBR (NS) 340 (CLRB no. 638); and Air Canada et al., supra, pages 117; 269; and 14,097).

In reaching this conclusion, the Board examined a number of factors that pointed to such common control or direction and then evaluated the general effect on the relationship between employers. In particular, the Board examined the question of the ownership of the businesses, the effect of corporate ties between the companies, the role played by the directors, the business operations carried on by each of the companies and their respective development plans.

This examination confirmed that the companies are still under common management and ownership and that the effect of this common management and ownership on the relationship is still such to support the conclusion that the business and financial ties between the employers are sufficiently close to be able to infer that there is common operation of the enterprises. In addition to the fact that Radio de la Baie is wholly owned by Radio Acadie, that both companies have the same directors and that their headquarters is in the same location, it is clear that both fundamental control and day-to-day control (direction) over the businesses are exercised by the same persons, Radio de la Baie being subject to the direction and control of Radio Acadie.

In addition to the close business and financial ties between the employers, there are other important indicators of the common direction and control exercised by the employers in the instant case. The collective agreement which, until the end of March

1993, covered the employees of both stations, is a perfect example of this common direction and control. In this regard, the Board gives no weight to the employers' "gun to the head" argument that they had no choice but to agree to apply to CKLE, for its duration, the agreement negotiated for CJVA. In the Board's opinion, the renewal of this agreement, with the employers' approval, destroys the credibility of this argument.

In the Board's view, an examination of the construction of this collective agreement confirms on every count that there is common direction of the businesses. If this is not the case, why, then, does the agreement define the "Employer" as designating "Radio Acadie Ltée or its successor, and Radio de la Baie Ltée or its successor" (article 4.07; emphasis added)? Why did the parties not simply limit this agreement to Radio Acadie and agree at the same time, in a separate document, that it would also apply mutatis mutandis to Radio de la Baie? However, since this solution was ruled out, why then, if the businesses are in fact directed separately, and there is no relationship between the two stations, did the parties not make a distinction, anywhere in the agreement, between the employers when it comes to giving notices (see, for example, article 30.02.01) and making payments (see, for example, article 20.23)? Why treat the studios of CJVA and of CKLE as a entity (see article 28.12)? Why refer to CJVA and CKLE as "the work place" (see article 28.09)? Why stipulate, without differentiating, that "the Employer's management right with respect to information shall be exercised by the director/manager or his representative to whom the reporters are accountable for their journalistic behaviour" (article 24.07; emphasis added)? Why have only one seniority list that does not even distinguish between stations? Why sign "for the Employer" (and this formulation appears, moreover, in other agreements), without even the participation of a representative of each company?

The Board has reaffirmed before that it assesses the factual situation but will not give decisive weight to agreements where they are not confirmed by the facts (see Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRB

no. 383)). Consequently, the Board considers artificial the distinction that this collective agreement makes between Radio Acadie and Radio de la Baie and concludes that the reality, as expressed through this collective agreement, is that there is a single employer in terms of both the fundamental control and the direct or immediate control which is exercised by the employers and to which the two broadcasting enterprises are subject.

Concrete evidence of this reality is also found in the correspondence sent by Mr. Roussy both to the union and to the employees. Using Radio Acadie's letterhead and writing on its behalf, Mr. Roussy, depending on his thoughts at the time, referred in one instance to "our two stations (CJVA and CKLE)" and in another announced the creation of a position at CKLE. The examples are many, and the Board considers them convincing.

For these reasons, the Board finds that the five criteria that must be met before a declaration of single employer can be made are still present.

2. The Appropriateness of Making a Declaration of Single Employer

Once the Board has concluded that the requirements for applying section 35 of the Code have been met, it must determine whether it is appropriate to make the declaration of single employer requested. In fact, the Board has in this regard discretionary power and is guided in the exercise of this power by the purpose of section 35.

Intervention under section 35 of the Code will be warranted only if the Board is satisfied that the existence of two or more businesses under common direction prejudices the exercise of existing bargaining rights. As the Board explained in an earlier decision:

"The mere existence of corporate entities under common control or direction is not enough to attract a declaration under section 133 [now section 35] even if the activities are associated or related. ... Declarations will only be issued to cure some mischief, either real or pending. The purpose of a declaration should correspond with the purposes of the section, i.e., to prevent avoidance of obligations under the Code or to minimize the adverse effect of corporate multiplicity on existing bargaining rights."

(Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB no. 501), pages 84; and 20)

The purpose of section 35 is remedial. This is why, when the Board decides whether or not to exercise its discretion, "the question ceases to be whether common control exists; it becomes whether common control contributes to the erosion of bargaining rights" (Air Canada et al., supra, pages 119; 14,098; and 271). Generally, section 35 "is designed to ensure that employers only distinct in appearance do not succeed in circumventing their obligations under the Code by resorting to corporate restructuring or other types of business arrangements" (Air Canada et al., supra, pages 118; 14,098; and 271). Moreover, section 35 is not aimed at enhancing existing bargaining rights (see British Columbia Telephone Company and Canadian Telephones and Supplies Ltd. (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRB no. 108); and Air Canada et al., supra, pages 118, 14, 098; and 271). Consequently, if it is shown that business ties are legitimate and were established in good faith, and if the Board is satisfied that the arrangements between businesses do not compromise the establishment or maintenance of sound labour relations, it will not intervene. In fact, where the arrangements are founded on a legitimate business objective, and these arrangements are not likely to prejudice the collective rights of unionized employees, the Board will have difficulty concluding that the existing common control will erode bargaining rights.

However, if the collective bargaining structure that such business arrangements create does not appear to permit the establishment of sound labour relations, then the Board

may make a declaration of single employer to ensure that the business structure established does not prevent the attainment of the Code's objectives. This is the case, for example, when there is an artificial division of employees based on corporate veils rather than on a genuine employment relationship. This applies even if it is established that the employers are not attempting, through their business arrangements, to circumvent their obligations under the Code.

In short, for the Board to deem it appropriate to make a declaration of single employer, it must be satisfied that labour relations would be better served by such a declaration: see The Canadian Press et al., *supra*; British Columbia Telephone Company and Canadian Telephones and Supplies Ltd., *supra*; Emde Trucking Ltd., *supra*; Murray Hill Limousine Service Ltd. et al., *supra*; Autocar Connaissance Inc. and Murray Hill Limousine Service Ltd. (1988), 76 di 139 (CLRB no. 723); Canada Transport Group Ltd. (1989), 78 di 175; 5 CLRBR (NS) (2d) 119; and 89 CLLC 16,044 (CLRB no. 759); Air Canada et al., *supra*; Ottawa-Carleton Regional Transit Commission et al. (1988), 72 di 189; and 19 CLRBR (NS) 165 (CLRB no. 670), affirmed by the Federal Court of Appeal in Amalgamated Transit Union v. Ottawa-Carleton Regional Transit Commission et al., judgment rendered from the bench, file no. A-110-88, May 2, 1989.

On closer examination of the circumstances that gave rise to the present application, the union's persistence in its initiatives comes as no surprise. The union sees no reason why a distinction should be maintained between the two legal entities, Radio Acadie and Radio de la Baie, when the parties have been conducting their labour relations through a unified bargaining structure since CKLE began operations.

However, in the instant case, there can be no doubt that the arrangements at issue here are in keeping with normal business practices. Economic profitability and tax purposes justified these arrangements. From this perspective, no negative conclusion could be drawn from the events cited by the union to warrant the Board's intervention,

namely, the restructuring of CJVA and the ensuing lay-offs. Moreover, Radio Acadie's holdings in Radio de la Baie cannot be characterized as anything other than an investment. In other words, it is clear that the business arrangement between the companies is founded on a legitimate business objective.

Business transactions are not the reason why the employers want separate collective agreements negotiated. Their argument is rather a strictly legal one based on the fact that separate bargaining units exist. Consequently, if the union's purpose were simply to enhance its bargaining position by obtaining a unified bargaining structure, its application would fail.

However, the Board believes that such is not the case here. The evidence reveals instead that a unified structure developed by itself to govern the labour relations of the parties. The business arrangements at issue here have produced an intermingling of personnel through employee transfers and intercorporate assignments. In reality, the employees all have the same working conditions and are all supervised by the same person. From this perspective, the union's application cannot not be viewed as an attempt to alter the status quo that exists between the parties. On the contrary, we are forced to conclude that its purpose is rather to maintain this status quo. Moreover, since the union is already the bargaining agent certified to represent the units of employees it seeks to consolidate, we cannot conclude that its status is a bar to granting its application for a declaration of single employer because such a declaration would not enhance its bargaining rights. Furthermore, the collective agreement that has governed relations with the official employers since CKLE began operations applies to both these employers and treats the employees as a single group.

Since the Board issued the second certification certificate and its decision to dismiss the union's first section 35 application in November and December 1992 respectively, it is clear that the labour relations of the parties have deteriorated. It is clear that the

new bargaining structure that divides the employees into two groups according to the station where they work poses problems in terms of its effects on labour relations.

Clearly the union is itself the author of the bargaining unit structure against which it is now rebelling. Any criticism of the union for acting the way it has must, however, be tempered. The situation was not clear and, as union president Ghislaine Foulem explained, by seeking a second certification certificate covering the employees of CKLE, the union's objective was to protect the rights of this group, not to divide the already existing group.

In these circumstances, the Board concludes that a valid labour relations objective would be served by making a declaration of single employer because it opens the way for a review of the existing bargaining structure under section 18 of the Code.

3. The De Facto Employer

In the Board's opinion, it is especially appropriate to make a declaration of single employer in the instant case because the evidence reveals such a highly unified management structure that it could even be said that there is in fact only one employer, rather than a multiplicity of employers constituting a single employer within the meaning of section 35 of the Code. The Board in fact has the power, under section 16(p) of the Code, to determine the employer's identity. Were it to proceed in this manner, it could then directly apply section 18 of the Code to review the collective bargaining structure in place in the business, without availing itself of section 35.

Strictly speaking, it is true that in this case there are at least two businesses within the meaning of "operations." As the CRTC's official documents indicate, the licences issued by the agency are licences to operate a broadcasting enterprise, and Radio Acadie and Radio de la Baie, which are separate legal entities, each operate such a

licence. And since these are businesses that operate radio broadcasting stations (CJVA-AM in the case of Radio Acadie and CKLE-FM in the case of Radio de la Baie), it is clear that these are federal works, undertaking or businesses (see section 2 [Definitions - federal work, undertaking or business], paragraph (f) [a radio broadcasting station] of the Code).

However, if it must be acknowledged that there are two businesses, two functional economic vehicles, capable of subsisting independently of one another, as coherent parts that are organically severable from the whole of an integrated operation, this does not mean that it automatically follows that there are two employers under the Code. In this regard, the Board has repeatedly held that, in identifying the employment relationship, it does not dwell on what it termed "corporate mysteries." The existence of an employment relationship must above all be considered in light of what the facts reveal about the performance of work and the establishment of the employment relationship. In other words, it is in light of the factual situation, rather than the form of the transaction, that the employment relationship must be assessed. (See in particular Nationair (Nolisair International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630); Urbain et Chartrand Inc. (1985), 55 di 257 (CLRB no. 508); Canadian Broadcasting Corporation, *supra*; Maska Manpower Inc. (1984), 57 di 193 (CLRB no. 487); and Transport Bélanger Lemire Inc. et al. (1990), 79 di 165 (CLRB no. 777).)

In Nationair (Nolisair International Inc.), *supra*, the Board restated the criteria it takes into account in assessing an employment relationship to determine the identity of the real employer of the employees:

"1. The Board will assess the factual situation but will not give decisive weight to agreements where they are not confirmed by the facts.

Thus, in our jurisdiction, significant weight cannot be given to the payment of wages. The Canada Labour Code speaks of an employee (employé) and makes no reference to remuneration in the definition of this term, contrary to the Quebec Labour Code, for example, which gives a salaried employee (salarié) freedom to associate. More significant will be the identification of the person who does the paying, who ultimately bears the cost, and the impact this has on the employment relationship.

2. Another indicator will surely be the person who controls access to employment: the person who hires or who gives the work to be performed. Here, regard must be had to the selection process and the criteria used. The person who in fact has the power to approve the selection and influence it decisively is more akin to an employer than a mere occasional user. The lessee who retains or exercises a veto or the equivalent over the selection of personnel is certainly not extraneous to the employment relationship.

3. A third criterion concerns the actual establishment of working conditions. Who actually establishes working conditions? An agency that is merely a disguised employment office, a kind of clearing house with a title, could hardly be termed an employer. In this situation, it would merely be an agent acting on behalf of the employer, the equivalent of the personnel department of a company of which it is an integral part and whose wishes it carries out as an employee.

4. Another criterion concerns the actual performance of work. How is the work performed on a day-to-day basis? Who assigns the work? Who in fact determines and approves the standards governing the performance of the work? In this regard, who has the last word, the final say? Is it the person who evaluates, who decides, who determines that an employee will work or be terminated because of his performance? What expertise does the agency have with respect to the work performed? What is the degree of similarity between the duties performed by regular employees and those performed by employees from outside?

5. Other criteria may also assist the Board in its determination: the employees' perception, their identification with the company, their degree of integration into the company, the fortuitous, temporary or permanent nature of their employment with the leasing company."

From this perspective, one could therefore ask whether Radio de la Baie, which holds the licence that authorizes the operation of radio broadcasting station CKLE, is indeed, in the factual situation as experienced by the personnel whom it employs, "the employer" of these individuals. One could in fact ask whether it is not rather Radio Acadie that is the real "employer" of the personnel working at the two stations, CJVA-AM and CKLE-FM. Even though radio broadcasting station CKLE is more than a separate work place, and even though it is also, as we indicated earlier, a functional economic vehicle, a going concern capable of subsisting as an independent entity, this observation must not be confused with that relating to the identification of the real employer of the employees.

Mr. Roussy, general manager of both stations, testified that he had been in Radio Acadie's employ since November 1988. He is the one who hires and supervises the personnel of both stations, co-ordinates their movement, decides on the employees' fate and administers the collective agreement. He is the one the union contacts and the employer's spokesperson at the bargaining table. Rufino Landry, one of Radio Acadie's principal shareholders, was also, until very recently, paid by Radio Acadie. He also participates in the management of personnel and holds final decision-making authority. Moreover, until Mr. Roussy's arrival, Mr. Landry performed Mr. Roussy's duties at CJVA. In this regard, Claude Girard, union advisor and spokesperson for the union at the bargaining table stated for his part that he had always dealt with Mr. Roussy or Mr. Landry on all matters involving the two stations, but never with Mr. Degrâce. Moreover, Mr. LeBouthillier, the other principal shareholder in Radio Acadie, testified before the Board that he always relied on Messrs. Landry and Roussy, to whom he gave a free hand in labour relations matters.

In practice, then, since Mr. Roussy reports to Radio Acadie, one could easily conclude that terms and conditions of employment, i.e., hours of work, assignments, personnel movements, definitions of duties of employees working both at CJVA and

at CKLE, are the responsibility of Radio Acadie which alone decides at the bargaining table what these employees will do and how they will do it. Similarly, one could conclude that it is also Radio Acadie, through Messrs. Roussy and Landry, that determines and approves work performance standards and that has the final authority to hire, terminate, lay off and discipline employees, whether they work in Bathurst or in Caraquet.

Certainly, the wages of the employees who work at CKLE are paid by Radio de la Baie, but the actual wages are set by the owners of Radio Acadie and are merely applied by Radio de la Baie. In reality, then, one could also conclude that Radio Acadie does the paying, ultimately bearing the cost, and draw conclusions from this concerning the employment relationship.

The employees' perception could also confirm this reality. According to Mrs. Sandra Landry and Ghislaine Foulem, if the two stations are distinct in terms of their respective mandates and activities, they cannot be distinguished in terms of the employer's identity since they identify Radio de la Baie and Radio Acadie with Mr. Roussy.

One could therefore seriously ask whether it is Radio Acadie, and not Radio de la Baie that for all legal purposes exercises fundamental control over employment and labour relations in the instant case.

Whatever the case may be, such a determination is not, however, necessary or appropriate in the circumstances since none of the parties questioned the fact that there were indeed two employers and since the Board, assuming this fact to be true, concluded that it was appropriate to make a declaration of single employer. Nevertheless, if this analysis may in this respect seem superfluous, it nonetheless speaks eloquently of the difficulties that maintaining an artificial division of "employers" poses in terms of labour relations.

B. The Application to Review the Existing Bargaining Units

In its application, the union asked the Board (once the declaration of single employer is made) to consolidate in a single bargaining unit the units at CJVA and CKLE to reflect the situation that has always existed, namely, a unified bargaining procedure so that a single collective agreement is negotiated.

The Board has the power, under section 18 of the Code, to review the bargaining unit structure of a business, whenever it deems it appropriate. As the Board stated in Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661), affirmed by the Federal Court of Appeal in Nova Scotia Nurses Union, DEVCO Local v. Canada (Labour Relations Board), [1990] 3 F.C. 652; (1989), 58 D.L.R. (4th) 225; and 98 N.R. 119 (C.A.):

"It is well established by now that section 119 [now 18] provides the Board with an independent plenary power to review, rescind, amend, alter or vary any order or decision which it previously made. This power can be triggered by an application from a party affected by the order or decision, or it can be used by the Board on its own motion. The recognition of this independent plenary power can be found in Labour Relations Board of the province of British Columbia et al. v. Oliver Co-operative Growers Exchange, [1963] S.C.R. 7; (1962), 40 W.W.R. 333; and 62 CLLC 15,428; Canada Labour Relations Board v. National Association of Broadcast Employees and Technicians, [1980] 1 F.C. 720; Canadian Broadcasting Corporation v. Canada Labour Relations Board, no. A-467-82, January 22, 1985 (F.C.A.); Claude Latrémouille v. Canada Labour Relations Board, no. A-445-82, January 22, 1985 (F.C.A.); and Union des Artistes v. Canadian Union of Public Employees et al., no. A-725-82, January 22, 1985 (F.C.A.)."

(pages 93; 233; and 14,031)

The union argued that the existing structure adversely affects it in that the structure creates needless obstacles to bargaining, seriously limits the mobility of the employees

who do similar work and hence undermines industrial peace. The employer replied that "it is totally incorrect to claim that the existence of two collective labour agreements would create chaos that would destabilize labour relations in the circumstances". As the Board explained in Canadian Pacific Limited (1992), 88 di 126 (CLRB no. 944), at pages 135-136; and in Canadian National Railway Company (1992), 88 di 139 (CLRB no. 945), at pages 148-149:

"While there is no specific presumption in favour of all-employee (or even 'all craft employee') bargaining units (see Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726), pages 182-183), the Board has long favoured the larger, more comprehensive unit. In Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59), the Board adopted an analysis of the relevant factors set out in the decision of the British Columbia Labour Relations Board in Insurance Corporation of British Columbia et al., [1974] 1 Can LRBR 403 (B.C.), pages 408-411. The factors there considered included the following:

- *administration efficiency and convenience in bargaining;*
- *enhancement of lateral mobility of employees;*
- *facilitation of a common framework of employment conditions;*
- *increased industrial stability.*

The importance of these factors was confirmed and additional related factors were discussed in the recent Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675), the additional factors including the following:

- *overlap in the work performed by members of different bargaining units;*
- *common supervisory responsibility;*
- *operational contact between members of the various units;*
- *similarity of collective agreement provisions;*

- *the existence of work jurisdiction disputes.*"

This case reveals that all these factors are present. This warrants the Board's examining the appropriateness of an application to restructure the bargaining units. This also demonstrates to the Board that it is not premature to proceed forthwith with a restructuring, even though only a year and a half have passed since the second certification certificate was issued.

As a rule, the Board's policy favours broader-based collective bargaining: see Canadian Pacific Limited, *supra*, at page 134; Canadian National Railway Company, *supra*, at page 147; and Canadian Broadcasting Corporation (1991), 84 di 1 (CLRB no. 846). Furthermore, the picture that was painted of the situation shows that, in the instant case, the calling into question of the collective bargaining structure established by the parties in the past is the source of the current impasse at the bargaining table.

On the one hand, the union cited the employer's refusal to negotiate a single collective agreement in support of its refusal to bargain. On the other hand, the employer cited the formal certification structure in demanding the successive, but not simultaneous negotiation of two collective agreements, also insisting that the parties negotiate first the agreement covering the employees of CKLE. At first glance, problems of this kind conceal bad faith bargaining, and the Board could be expected to ignore them because no such complaint has been duly filed (see sections 50 and 97(3) of the Code). However, the circumstances of the present case reveal that these problems result from the bargaining structure in place rather than from the parties' attitude *per se*. Consequently, in the Board's opinion, these problems could not be resolved through bad faith bargaining complaints, whichever party might make them (see Western Cablevision Ltd. et al. (1986), 65 di 150 (CLRB no. 573), at pages 160-161; and J. Phillips et al. (1978), 34 di 603; and [1979] 1 Can LRBR 180 (CLRB no. 168), at pages 615; and 190).

In the context of the businesses involved, after examining the situation that exists between the parties, the Board is satisfied that a merger of the units is necessary. Consolidating the employees in a single unit will put an end to the impasse at the bargaining table caused by the irreconcilable positions adopted by the employer and the union concerning the bargaining structure. These positions, rightly or wrongly, have thus far only succeeded in paralysing, to the employees' detriment, the collective bargaining process.

Moreover, the Board believes that this reorganization will facilitate labour relations both for the bargaining agent and for the employer in that they will have to bargain only once for all employees. From the employer's standpoint, merging the units will eliminate the risk of whipsaw bargaining in which the bargaining units could have engaged. It will negotiate with everyone at the same time. From the employees' standpoint, the merger will serve their needs and aspirations which do not really differ from one station to the other. In the Board's view, including these 15 employees in the same unit cannot help but promote the establishment of more realistic, and hence healthier, labour relations between the parties (see in this regard Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675); Canadian Broadcasting Corporation (846), *supra*; Canadian National Railways (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41); Canadian Pacific Limited, (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59), pages 28; 366; and 492. Of course, the Board is not obliged to determine the *most appropriate* bargaining unit. The Code merely speaks of determining appropriate units. However, one does not preclude the other. We believe that a review can — indeed must — serve to define the units, or in this case the unit, that best meet the needs of the employees and the employer.

Having said this, the Board is of the opinion that certain problems cited by the union in arguing that the structure was not adequate are problems it had to face when it was a party to the single collective agreement. These problems relate to the compliance

with this agreement and are therefore problems that would not warrant a review of the bargaining structure.

The union also presented evidence to show that there was a serious risk of CJVA closing. According to the union, by allowing the employer to insist on negotiating two separate collective agreements, the present structure compromised the job security of the employees working at this station. The union thus sought to persuade the Board of the serious risk to the most senior CJVA employees of signing two separate collective agreements, in that these employees might be less well protected should the station close or be restructured. This evidence was limited to testimony concerning "rumours" of a "possible" closing of CJVA, testimony that was presented to justify the union's concern that the feared closing would result in employee lay-offs or reassignments. During cross-examination, it was established that such rumours circulated constantly and that this was pure speculation.

Employer witnesses acknowledged that this scenario was a possibility, should the business's financial situation deteriorate further as a result of the unprofitability of one station or the other. They stated that an eventual closing would automatically mean job losses and possibly the movement of certain employees through bumping. If the employer insisted on negotiating separate agreements, it was, as it claimed, because this would enable it in each case to adjust the situation so as to enhance the profitability of each station based on their respective situations, i.e., an expanding CKLE and a recovering CJVA. In short, the employer argued that for both stations to be able to continue operating, greater flexibility was necessary.

In the Board's opinion, this evidence is irrelevant in the context of the present case. The bargaining structure is never a guarantee of the maturity and economic realism of the parties. If the bargaining structure is inappropriate in the instant case, it is not because of questions like those cited earlier which essentially have to do with bargaining. It is rather because of the reality which the parties face, namely, a single

business in terms of both labour relations and economics. It is not because this structure would put the employees in a more risky situation economically or because it would benefit the employer in this regard. The bargaining structure of a business must not be viewed as an "economic reality insurance." It is merely a framework designed to give employees access to the system of free collective bargaining established by the Code and to enable them to bargain collectively. Certainly the system's purpose is to redress the imbalance in the distribution of power between isolated employees and their employer in order to strengthen the party that is more disadvantaged economically, namely the employees. However, this system is not a safeguard against economic realities. If the scenario feared by the union in this case were to become reality, the employees' rights would not necessarily be better protected against this possibility by the presence of a single unit. Similarly, a single unit will not further compromise the stations' economic health.

In this regard, the Board recalls what the Woods Task Force said in commenting on collective bargaining in a changing world:

"124. Nevertheless, collective bargaining must be judged by its function. It is a form of strategy in a mixed enterprise economy for the protection of the interests of labour. As such it is a means to an end, not an end in itself. ..."

(Canadian Industrial Relations: The Report of the Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968) (Chair: H.D. Woods), page 38; emphasis added)

On final analysis, if this evidence had been relevant, we would have had no alternative but to favour the employer's position, because there can be no sound and productive labour relations without a business and the jobs that it provides.

However, if the Board deems appropriate to amend the existing bargaining structure, it does so not to satisfy the economic interests of one party, but because it considers

it appropriate, having determined after examining the situation that exists between the parties that the bargaining structure in place was not, or was no longer, appropriate.

VI

Disposition

For all these reasons, the Board:

GRANTS the union's application;

DECLARES that employers Radio Acadie Ltée and Radio de la Baie Ltée constitute a single employer within the meaning of section 35 of the Code;

REVIEWS, pursuant to section 18 of the Code, the bargaining units in respect of which the union is certified, which units comprise:

"all employees of Radio Acadie Ltée, excluding president (director/manager), director of programmes, accountant, and salesmen"; and

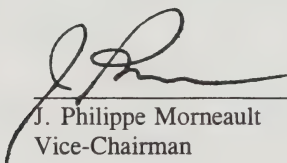
"all employees of Radio de la Baie Ltée CKLE-FM, excluding manager and salespersons";

CONSOLIDATES said bargaining units into a single unit; and

DETERMINES that the appropriate bargaining unit is a unit comprising:

"all employees of Radio Acadie Ltée, CJVA-AM, and Radio de la Baie Ltée, CKLE-FM, excluding director/manager, manager, accountant, and salespersons."

Formal orders giving effect to these conclusions will be made concurrently with the issuing of these reasons.



J. Philippe Morneau
Vice-Chairman



Robert Cadieux
Member



Véronique L. Marleau
Member

information

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Summary

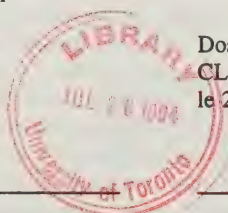
Canadian Broadcasting Corporation, *applicant*, and The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, *respondent*.

Board File: 725-339
CLRB/CCRT Decision no. 1072
June 28, 1994

Résumé

Société Radio-Canada, *requérante*, et Alliance internationale des employés de la scène et des projectionnistes des États-Unis et du Canada, section locale 58, *intimée*.

Dossier du Conseil: 725-339
CLRB/CCRT Décision n° 1072
le 28 juin 1994



The applicant brought an application pursuant to section 91 of the Code for a declaration of an illegal strike. In the course of an agreement resolving that matter, the parties requested the Board to make a determination, pursuant to sections 16(p)(vii) and (viii), as to whether the terms and conditions contained in an expired voluntary collective agreement between them remained in effect and subject to the provisions contained in sections 50 and 89(1)(a) to (d) of the Code.

L'employeur avait présenté une demande de déclaration de grève illégale en vertu de l'article 91 du Code. Les parties ont réglé l'affaire et dans leur entente, elles ont demandé au Conseil de déterminer, en conformité avec les sous-alinéas 16(p)(vii) et (viii) du Code, si les modalités de la convention collective volontairement reconnue demeuraient en vigueur et continuaient d'être assujetties aux dispositions de l'article 50 et des sous-alinéas 89(1)a) à d) du Code après l'expiration de la convention collective.

IATSE has been the voluntarily recognized bargaining agent which has concluded collective agreements with the CBC for the past 20 years. The agreement contains an automatic renewal clause and stipulates time requirements in which notice to bargain must be served. It also anticipated the agreement's termination.

L'IATSE est un agent négociateur volontairement reconnu qui a des conventions collectives avec la SRC depuis 20 ans. La convention renferme une clause de renouvellement automatique et prévoit le délai dans lequel on doit signifier l'avis de négocier. Elle prévoit aussi l'expiration de la convention.

IATSE served the employer with a "notice to terminate" within the time limitations contained in the voluntary agreement. The employer, thereafter, served a notice to bargain which was outside of the time limitations contained in the collective agreement but within that prescribed in section 49(1) of the Code. The Board determined that the provisions of section 49(1) of the Code supersede those contained in the collective agreement.

As well, section 49(1) of the Code provides the "parties" to a collective agreement with the right to engage in the process of collective bargaining. Once that right is exercised by service of the appropriate notice under section 49(1), an obligation is imposed on the parties to bargain collectively pursuant to section 50 regardless of whether or not that agreement is negotiated as a result of a voluntary recognition or pursuant to a certification order of the Board. Service of the notice to bargain has the effect of maintaining industrial peace until the requirements prescribed by section 50 and 89(1)(a) to (d) are met.

L'IATSE a signifié à l'employeur un « d'expiration » dans le délai prévu par la convention volontairement reconnue. L'employeur a par la suite signifié l'avis de négociation. Bien que cet avis n'ait pas été signifié dans le délai prévu par la convention collective, le délai prescrit au paragraphe 49(1) du Code a été respecté. Le Conseil a conclu que les dispositions du paragraphe 49(1) du Code l'emportent sur celles de la convention collective.

De plus, le paragraphe 49(1) confère aux parties à une convention collective le droit d'amorcer la négociation collective. Lorsqu'une des parties exerce ce droit en signifiant à l'autre l'avis approprié, aux termes du paragraphe 49(1), les parties doivent négocier collectivement en conformité avec l'article 50. Peu importe que la convention collective ait été négociée à la suite d'une reconnaissance volontaire ou d'un certificat d'accréditation rendu par le Conseil. Une fois signifié, l'avis de négociation a pour effet de maintenir la paix industrielle jusqu'à ce que les exigences de l'article 50 et des alinéas 89(1)a) à d) aient été remplies.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE
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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Canadian Broadcasting Corporation,

applicant,

and

The International Alliance of Theatrical Stage
Employees and Moving Picture Machine
Operators of the United States and Canada,
Local 58,

respondent.

Board File: 725-339

Decision no. 1072

June 28, 1994

The Board:

Mr. Richard I. Hornung, Q.C., Vice-Chairman, and Mr. Michael Eayrs, Member,
and Ms. Mary Rozenberg, Member.

Reasons:

Mr. Richard I. Hornung, Q.C., Vice-Chairman.

Appearances:

Mr. Guy Dufort for the applicant; and

Mr. Thomas W.G. Pratt for the respondent.

I

The Canadian Broadcasting Corporation ("CBC") brought an application, pursuant
to section 91 of the Code for a declaration of an illegal strike by the International

Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58 (IATSE). The parties agreed to resolve that matter. However, as part of that agreement, the Board was requested to determine, pursuant to section 16(p)(vii) and (viii) of the Code, whether the terms and conditions contained in an expired voluntary collective agreement between the parties remained in effect and subject to the provisions contained in section 50 of the Code.

II

The relevant facts can be briefly stated. More than twenty years ago, CBC voluntarily recognized IATSE as the bargaining agent for a unit of its member employees who performed staging, lighting and other technical work for CBC at a number of venues in the Toronto area.

Since that time, CBC and the IATSE have had a collective bargaining relationship and successively entered into collective agreements setting out the terms and conditions of employment of IATSE members for those sites in Toronto described in Article 1.2 of their collective agreement (Exhibit 2).

The most recent in the series of collective agreements between the parties expired on January 31, 1994. The agreement contains the following provisions with respect to its re-negotiation and renewal:

"ARTICLE 21

NOTICE OF RE-NEGOTIATION

21.1

In the event that prior to the expiration of this Agreement either party desires to negotiate a new Agreement, notice in writing by registered mail shall be given to the other party not less than thirty (30) days and not more

than ninety (90) days prior to the expiry of this Agreement. If such notice is given by either party and no new Agreement is reached, all the provisions of this Agreement shall continue to be observed by both parties until ninety (90) days after the expiry date of this Agreement, or until seven (7) days after the report of the Conciliation Board is received by the Minister of Labour, or until as set forth in Section 71 of the Canada Labour Code.

...

ARTICLE 23

AUTOMATIC RENEWAL

23.1

If neither party gives notice of termination, nor of a desire to negotiate a new agreement, this agreement shall be automatically renewed for a further period of one (1) year, and from year to year thereafter."

In a letter dated December 31, 1993, (Exhibit 1), James C. Fuller, IATSE's Local 58 President, informed the CBC as follows:

"Please be advised that Local 58, I.A.T.S.E. Toronto, wishes to give notice that it wants to negotiate an orderly termination of it's (sic) Contract with the Corporation, effective January 31, 1994. We wish to discuss working in our jurisdiction without a contract."

By a letter dated January 18, 1994, (Exhibit 3) the CBC replied to IATSE's communication stating:

"... I wish to advise you that the CBC is very interested in renewing and/or re-negotiating the current collective agreement ...

Your letter raises a number of questions that I would like to discuss with you directly in person. I now understand that our tentatively scheduled meeting for February 1, 1994, is not possible given that Suzanne Steeves is not available on that day. I will be in touch with your office in the near future to secure a mutually acceptable date for our meeting." ...

In the evidence and argument, much was said about the equivocal nature of the union's "termination" letter, and the employer's response, as well as the negotiating conduct of the parties subsequent to the service of their respective correspondence. Regardless of the interpretation placed on either, the central issue to be decided still remains: in the circumstances, do the terms and conditions of the voluntary collective agreement entered into between the parties remain in effect until the lawful right to strike or lockout, pursuant to the provisions of the Code, is acquired?

III

Section 3(1) the Code provides that a trade union can obtain bargaining agent status by virtue of its unrevoked certification or voluntary recognition by the employer:

"'bargaining agent' means

(a) a trade union that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and the certification of which has not been revoked, or

(b) any other trade union that has entered into a collective agreement on behalf of the employees in a bargaining unit

(i) the term of which has not expired, or

(ii) in respect of which the trade union has, by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining;"

As indicated by the Board in Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB no. 501):

"Without the need to go through the certification process before the Board, an employer can recognize a trade union as the bargaining agent for its employees in any bargaining unit that the employer and the trade union decide is appropriate. Once a collective agreement is entered into on behalf of those employees, the trade union obtains bargaining agent status."

(pages 80; and 16)

In the present case, the union argues that, by virtue of the definition of "bargaining agent" contained in section 3(1)(b) of the Code, it ceased being the bargaining agent for the collective bargaining unit when it served the notice of termination and did not provide a notice to bargain pursuant to section 49(1) of the Code. Its argument is best put forth by quoting directly from Counsel's brief:

"16. The respondent was never certified as the bargaining agent for the members of the bargaining unit in question. Collective Agreements were voluntarily made and renewed between the parties over the course of many years.

17. Until January 31, 1994, when the Collective Agreement between the parties expired, the Respondent was the bargaining agent for the members of the collective bargaining unit therein described. Until that date, the Respondent fell within the definition of 'bargaining agent' contained in Paragraph 3(1)(b)(i) of the Code. After that date, the Respondent could only continue as the bargaining agent for the members of the unit if it fell within the provisions contained in Paragraph 3(1)(b)(ii) thereof and had, 'by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining.'

18. *No such notice having been given, the 'freeze' provisions of Section 50 of the Code have no application. That section refers back to the notice to bargain provisions of Section 49 and it contemplates collective bargaining between the employer and the 'bargaining agent'. The Respondent ceased to be the 'bargaining agent' for the members of the bargaining unit when it failed to give notice of its intention to bargain.*
19. *The Collective Agreement between the parties therefore expired on January 31, 1994. Because no notice to bargain for the revision, renewal or replacement of the Collective Agreement was given by the Respondent, it is submitted that its bargaining agency status came to an end with the expiry date of the Collective Agreement and that such Collective Agreement was therefore no longer capable of renewal, revision, replacement or continuation. It expired for all purposes on January 31, 1994."*

Counsel's argument, although ingenious, is not convincing. Simply put, the notice to terminate given by the respondent is irrelevant in the circumstances.

Section 49(1) of the Code provides that:

"49. (1) Either party to a collective agreement may, within the period of three months immediately preceding the date of expiration of the term of the collective agreement, or within such longer period as may be provided for in the collective agreement, by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement."

(emphasis added)

As indicated, much of the evidence we heard related to whether or not the union's representatives actually bargained or intended to bargain with the employer after

service of the union's "notice of termination" of December 31, 1993. Regardless of the interpretation given to the terms of that letter, or the spin placed on the conduct of the union's representatives thereafter, the employer's letter of January 18, 1994 serves to provide the necessary notice to bargain required to bring the provisions of sections 49(1) and 50 into play.

Although the employer's letter of January 18, 1994 providing the notice to bargain was not served within the 30-90 day window required by Article 21.1 of the collective bargaining agreement, it is nevertheless timely for the purposes of the Code, since it meets the requirements of section 49(1).

In a recent decision, Reimer Express Lines Ltd. (1993), as yet unreported CLRB decision no. 1046, the Board stated that:

"...The statutory right of parties to commence the bargaining cycle contained in section 49 may be extended by the parties but cannot be changed, avoided or abridged. To permit otherwise would be to permit the parties to 'contract out' of the provisions of the Code."

(pages 5-6)

That statement remains sound whether the collective agreement in question is voluntarily arrived at or is a result of a certification order of this Board.

A notice to bargain which is timely pursuant to the provisions of section 49 of the Code supersedes any lesser timeliness requirements contained in the similar collective agreement provisions and has the effect of invoking the requirement, pursuant to section 50, to commence collective bargaining for the purpose of renewing or revising the collective agreement, even if it does not comply with the more restrictive notice provision set out in the collective agreement itself.

Bargaining agent status may be conferred on the union, pursuant to section 3(1)(b), by virtue of it having entered into a collective agreement:

(i) the term of which has not expired, or

(ii) in respect of which the trade union has, by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining;"

In this case, when the employer served its notice to bargain, pursuant to section 49(1) of the Code, the collective agreement between the parties had not expired. The definition of "bargaining agent" is descriptive of the status of the union at the time the notice to bargain is given. The union, therefore, pursuant to section 3(1)(b)(i), was the "bargaining agent" at the time it was served with the notice to bargain collectively, and remained such for the purposes of carrying out the bargaining agent obligations vested upon it by section 50 of the Code.

IV

Voluntary recognition, and the consequent execution of a collective agreement between the parties, brings with it certain enforceable rights and privileges which accrue inter se. Those rights, even though voluntarily provided, are nevertheless thereafter statutorily protected by various provisions of the Code. Paramount amongst them is the right for one party to require the other to bargain collectively for the purposes of renewing or revising or entering into a new collective agreement as provided for in section 49(1).

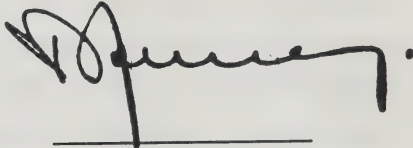
In the present circumstances, the notice to terminate the collective **bargaining agreement**, even if effectual, does not terminate the collective **bargaining relationship** between the parties. Section 49 does not speak of bargaining agents but rather refers to "parties" to the collective agreement. The public policy purpose of section 49 of the Code is to confer on the **parties a right** to engage in the process of collective bargaining. Once that right is exercised by service of the appropriate notice under section 49, an **obligation** to bargain pursuant to section 50 is imposed on the parties to the collective agreement regardless of whether that agreement was negotiated as a result of a voluntary recognition or pursuant to a certification order of the Board. (See also Dairy Producers Cooperative Limited (1990), 11 CLRBR (2nd) 45 (Sask.), at page 60; Armeco Construction Ltd. et al. (1984), 7 CLRBR (NS) 73 (B.C.), at page 87; and Inter City Glass Co. Ltd. no. 175/85, June 6, 1985 (BCLRB)).

Once appropriately served, the Notice to Bargain has the effect of maintaining industrial peace - until that point where the requirements of sections 50 and 89(1)(a) to (d) are met - and gives the parties an opportunity to negotiate the terms and conditions of a revised, renewed or new collective agreement without fear of interference with the terms and conditions of employment then in effect. To permit one party to preclude the other from exercising its right to commence the collective bargaining process, simply by filing a notice to terminate, would, in our view, be contrary to the basic objectives of the Code to promote constructive collective bargaining and industrial peace.

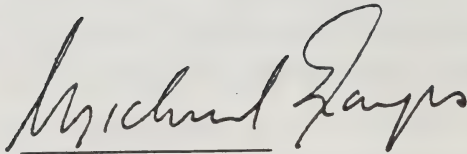
V

Accordingly, for the reasons above, we conclude that the employer served a valid notice to bargain pursuant to section 49(1) of the Code and, therefore, that the terms

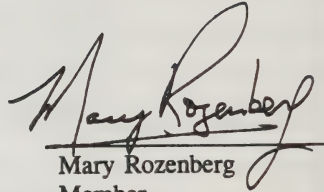
and conditions of the collective agreement between the parties remain in effect until such time as the parties have met the requirements of sections 50 and 89(1)(a) to (d) of the Code.

A handwritten signature in black ink, appearing to read "Richard I. Hornung", written over a horizontal line.

Richard I. Hornung, Q.C.
Vice-Chairman

A handwritten signature in black ink, appearing to read "Michael Eayrs", written over a horizontal line.

Michael Eayrs
Member

A handwritten signature in black ink, appearing to read "Mary Rozenberg", written over a horizontal line.

Mary Rozenberg
Member

information

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Summary

Retail, Wholesale Union, Local 580, *applicant*, Inter-City Truck Lines (Canada) Inc., Reimer Express Lines Ltd. and Western Canada Express/Schenker Inc., *respondents*, and Teamsters Local Union No. 31 and Reimer Express Enterprises Ltd., *interested parties*.

Board Files: 585-479
585-481

CLRB Decision no. 1073
August 2, 1994

These reasons for decision deal with applications for declaration of sale of business pursuant to sections 44, 45 and 46 of the Code where one of two wholly owned subsidiary transportation companies (ICTL) terminates its operations and parts thereof are "captured" by each of another wholly owned subsidiary transportation company (REL) carrying on the same kind of transportation business and by a freight forwarding company (WCE/S) partially owned by the same holding company (REEL).

The Board dismissed the application with respect to WCE/S as it found that company to be under provincial jurisdiction and not subject to the provisions of the Code.

Résumé

Syndicat des employés de gros et de détail, section locale 580, *requérant*, Inter-City Truck Lines (Canada) Inc., Reimer Express Lines Ltd. et Western Canada Express/Schenker Inc., *intimées*, et section locale 31 du syndicat des Teamsters et Reimer Express Enterprises Ltd., *parties intéressées*.

Dossiers du Conseil: 585-479
585-481

CCRT Décision n° 1073
le 2 août 1994

Les présents motifs de décision portent sur des demandes présentées en vue d'obtenir une déclaration de vente d'entreprise en vertu des articles 44, 45 et 46 du Code, dans une affaire où une de deux filiales à part entière d'une compagnie de transport (ICTL) a mis fin à ses activités et dont des parties ont été «acquises» par des filiales à part entière d'une autre compagnie de transport (REL) qui s'occupe du même type d'activités de transport et par un transitaire (WCE/S), lesquelles appartiennent en partie à la même société de portefeuille (REEL).

Le Conseil a rejeté la demande visant WCE/S parce qu'il estime que cette entreprise relève de la compétence provinciale et n'est donc pas assujettie au Code.

However, the Board granted the application with respect to REL's "capturing" as REEL's decision to reorganize the freight operations facilitated REL's "capture" of the business "abandoned" by ICTL when it terminated operations.

The Board also denied the applicant's request for Board to urge parties to dovetail seniority of those ICTL employees transferred to REL as neither party to the collective agreement governing the employees in the appropriate bargaining unit and binding on the trade union which is the bargaining agent for that unit has made application to the Board pursuant to section 45(3).

Cependant, le Conseil a agréé la demande concernant «l'acquisition» par REL parce que la décision de REEL de réorganiser les activités liées aux marchandises a facilité «l'acquisition» par REL de l'entreprise «laissée pour compte» par ICTL lorsque cette dernière a mis fin à ses activités.

En outre, le Conseil a rejeté la demande dans laquelle le requérant a demandé au Conseil d'inciter les parties à combiner les listes d'ancienneté des employés de ICTL et de REL parce qu'aucune des parties à la convention collective régissant les employés membres de l'unité habile à négocier et liant le syndicat qui est l'agent négociateur de l'unité n'a présenté de demande au Conseil en vertu du paragraphe 45(3).

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Reasons for decision

Retail, Wholesale Union, Local 580,

applicant,

and

Inter-City Truck Lines (Canada) Inc., Reimer
Express Lines Ltd. and Western Canada
Express/Schenker Inc.,

respondents,

and

Teamsters Local Union No. 31 and Reimer
Express Enterprises Ltd.,

interested parties.

Board Files: 585-479
585-481

Decision no. 1073
August 2, 1994

The Board was composed of Mr. J. Philippe Morneault, Vice-Chair, and Ms. Ginette Gosselin and Ms. Evelyn Bourassa, Members. A hearing was held in Vancouver, British Columbia, on May 11 and 12, 1993.

Appearances:

Mr. David K. Pidgeon, Esq., accompanied by Mr. Brian DeBeck, for the applicant;
and

Mr. Alan J. Hamilton, Esq., accompanied by Mr. Derek May, Esq., and Mr. J.D. Cockburn, Manager Human Resources and Industrial Relations, for all respondents
and for Reimer Express Enterprises Ltd. and

Mr. Ross Peterson, Business Agent, for Teamsters Local Union No. 31.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chair.

I

These are two identical applications filed pursuant to sections 44, 45 and 46 of the Canada Labour Code (Part I - Industrial Relations).

In the first application (file 585-479) which was filed with the Board on September 30, 1992, the Retail, Wholesale Union, Local 580 (the Applicant, the Union, or Local 580), asked the Board to declare that there had been a sale of business pursuant to sections 44 and 45 of the Code from Inter-City Truck Lines (Canada) Inc. (ICTL) to Reimer Express Lines Ltd. (REL).

In the second application (file 585-481) which was filed with the Board on October 22, 1992, the Applicant asked the Board to declare that there had been a sale of business pursuant to sections 44 and 45 of the Code from ICTL to Western Canada Express/Schenker Inc. (WCE/S).

II

Reimer Express Enterprises Ltd. (REEL) was at all times material to these cases the sole owner of all ICTL and REL shares. It also owned over 65% of WCE/S shares; and the remaining 35% were owned by Schenker of Canada Ltd. REEL was not an operating company.

Prior to September 30, 1992, ICTL and REL, both wholly owned subsidiaries of REEL, and WCE/S, which is 65% owned by REEL, all carried on business independently of one another in Western Canada.

Both ICTL and REL were then engaged in interprovincial road delivery of less than truckloads (LTL carriers) from west to east and vice versa - a "piggy back" operation. WCE/S on the other hand was and is a freight forwarder. Its business consists in operating a pool car business (loading and unloading railroad freight cars) from

premises rented from the Canadian National Railways in Vancouver. Prior to September 30, 1992, ICTL provided, under a contractual agreement, warehouse and pick-up and delivery service to WCE/S for its freight forwarding business.

During the summer and fall of 1992, REEL decided to reorganize the freight operation of REL and ICTL. It was decided that these two major companies would no longer operate in competition but would instead complement each other. This meant that ICTL would withdraw from Western Canada while REL would withdraw from the Ontario and Quebec region. The best efforts of both organizations were expended to convince ICTL customers in Western Canada to switch to REL and to persuade REL customers in Ontario and Quebec to switch to ICTL.

On September 30, 1992, as a result of that decision, management advised the 21 ICTL employees that ICTL would terminate its operations in Western Canada. These employees were offered positions, on a seniority basis, as new employees of REL and of WCE/S for those new positions which became available as a result of the corporate group's restructuring.

Consequently, WCE/S started employing its own warehousing people to perform warehousing functions and now employs 10 former ICTL employees for that purpose, and contracted with a non-affiliated company, J.B.C. Cartage to perform the cartage functions, which used to be carried out by ICTL. Consequently also, REL retained approximately 50% to 60% of the ICTL business for which it needed the influx of drivers referred to above, namely 13 former ICTL employees, bringing its total number of drivers to 62, and acquired certain equipment from ICTL. Whatever ICTL equipment was not required by REL was sold to other persons.

During the implementation of the above changes there were several discussions between management and the unions, that is to say the Applicant and the Teamsters Local Union No. 31 (the Teamsters or Local 31), during which WCE/S (which had not previously been unionized) offered to recognize voluntarily the Applicant, and

Local 31 made a concession that the hiring hall provisions of the REL collective agreement would be bypassed to absorb those ICTL employees REL needed and allowed those persons to commence employment immediately as new employees. Throughout these discussions, ICTL, WCE/S and REL maintained that there had been no successorship or sale of business, but rather that it was a case of closing of a business.

The Applicant took a different view of the matter principally to protect the seniority rights of its members, seeking to have their seniority dovetailed in the REL seniority list, and filed the present applications.

Shortly thereafter, the Applicant became convinced that WCE/S fell under provincial jurisdiction and therefore applied for certification to the British Columbia Labour Relations Board, which, at the time of this hearing, had deferred the question of whether WCE/S falls under federal or provincial legislation to this Board.

The respondents were required to present evidence to the Board which would distinguish the operations of WCE/S from those described in In Re Cannet Freight Cartage Ltd., [1976] 1 F.C. 174; (1975), 60 D.L.R. (3d) 473; and 11 N.R. 606 (C.A.), and Re The Queen and Cottrell Forwarding Co. Ltd. (1981), 33 O.R. (2d) 486; and 124 D.L.R. (3d) 674 (Div. Ct.). The only evidence provided by the employers was the expression of management's wish to have WCE/S in the federal jurisdiction as well as a collective agreement between WCE/S and Teamsters Local Union 938 (not a party in the instant case), resulting from a voluntary recognition, whose arbitration provisions give the Federal Minister of Labour the authority to appoint an arbitration board chair if the parties fail to do so. The employers' witnesses also explained that Worker's Compensation Board and Occupational Health and Safety levies are recognized as federal for WCE/S and that its pension plan is governed by the Federal Pensions Act.

Counsel for the employers advised the Board that the employers had no evidence to present which could distinguish the operations of WCE/S from those described in Cannet and Cottrell, *supra*.

III

Sections 2, 4, 44, 45 and 46 of the Code are the applicable statutory provisions:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province, ...

...

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

...

44.(1) In this section and sections 45 and 46,

'business' means any federal work, undertaking or business and any part thereof;

'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

45. (1) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, the Board may, on application to it by any trade union affected,

(a) determine whether the employees affected by the sale constitute one or more units appropriate for collective bargaining;

(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and

(c) amend, to the extent the Board considers necessary, any certificate issued to a trade union or the description of a bargaining unit contained in any collective agreement.

(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union.

(3) Either party to a collective agreement referred to in subsection (2) may, at any time after the sixtieth day has elapsed from the date on which the Board disposes of an application made to it under subsection (1), apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(4) On application being made to it pursuant to subsection (3), the Board shall take into account the extent to which and the fairness with which the provisions of the collective agreement, particularly those dealing with seniority, have been or could be applied to all the employees to whom the collective agreement is applicable.

46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question."

Section 92(10)(a) of the Constitution Act, 1867, reads as follows:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

...

10. Local Works and Undertakings other than such as are of the following Classes: -

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; ..."

IV

The Union argued that, contrary to what it requested in its application, the Board cannot make a declaration of sale of business with respect to that part of the ICTL business that was transferred to WCE/S since WCE/S is a freight forwarder and falls under provincial jurisdiction. It required the Board to make an expeditious ruling on this question so that it could pursue its application for certification before the British Columbia Labour Relations Board.

With respect to that part of the business of ICTL allegedly transferred to REL, the Union argued that, in line with the broad definition given to sale of business by prior Board jurisprudence, there is clearly a transfer of business and it required the Board

to so declare.

In connection with its main purpose for making the present applications, namely the dovetailing of seniority of its 13 members who went to work for REL, the Union asked the Board to urge the parties to follow the example set in Provost Cartage Inc. (1983), 53 di 155; and 4 CLRBR (NS) 248 (CLRBR no. 430).

The respondents argued that what in fact had occurred here was that one of two competitors had closed its business. They argued that the fact that REL had acquired certain ICTL assets did not make the transaction a sale of business under the Code and that any of ICTL's goodwill REL was able to pick up was due to the limited market. While they would like WCE/S to be under federal jurisdiction, the respondents can offer no operational distinction between this case and the above Cannet and Cottrell cases.

The Teamsters argued that the Board does not have the power to make any order with respect to seniority and submitted that they had done their best in the circumstances when they decided to entail the 13 former ICTL employees on the REL seniority list.

V

When deciding if a sale of business as defined under the Code has taken place the Board must give an affirmative answer to each of the following four questions: (1) Is the alleged buyer indeed operating a federal business or going concern? (2) Was the alleged seller operating the said federal business or going concern in whole or in part before the alleged sale took place? (3) Were bargaining rights tied to the seller's business or to any part thereof that was sold? (4) Has there been an actual sale or transfer within the meaning of the Code of that same business or part thereof to the buyer? (See Halifax Grain Elevator Ltd. (1991), 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRBR no. 867).)

The key question is in all likelihood the first one. As the Board stated in Burns International Security Services Ltd. and Canada Post Corporation (1989), 78 di 39; and 3 CLRBR (2d) 264 (CLRB no. 746):

"... However, for there to have been a sale of business under the Code, the seller and the purchaser must both fall within federal jurisdiction, there are no successor rights bridges between federal and provincial entities. ..."

(pages 41; and 265)

We now turn to this question in the instant case. The Board heard evidence to the effect that the operations of WCE/S are undistinguished from the above Cannet and Cottrell cases. The judgment of Steele, J., for the Court in Cottrell, *supra*, illustrated the reasoning of the courts in both these cases:

"... The railway company is the only body carrying on the interprovincial undertaking and it has the physical works as well. Clearly, if an individual customer of Cottrell wished to ship goods to the west, it would contract with the railway company to ship such goods. The mere fact that by contract Cottrell agrees with that individual customer to enter into the contract with the railway company and become the shipper itself, does not make Cottrell anything other than a shipper. The shipment is merely part of an over-all contract and a person who has no tangible or physical property under its control to operate an undertaking cannot, by contract, make himself a person carrying on an undertaking within the meaning of s. 92(10)(a) of the British North America Act, 1867. Cottrell is not carrying on an undertaking or operation but is merely providing a service by contract. To hold otherwise would mean that any travel broker or other person engaged in general commerce could, by contract, provide interprovincial undertakings, even though he had no facilities whatsoever, and thereby claim that he was not subject to provincial jurisdiction. ..."

(pages 492; and 679-680)

Consequently, the first question must be answered in the negative with respect to WCE/S and, since WCE/S is not operating a federal business or going concern, the

Board cannot make a declaration of sale of business and dismisses that application (file 585-481).

With respect to the other alleged purchaser, REL, is it indeed operating a federal business or going concern? REL was and is engaged in interprovincial road delivery, as an LTL carrier. As such, it is operating a federal business (see Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657; and [1954] A.C. 541 (P.C.)).

Was the alleged seller ICTL operating the said federal business or going concern in whole or in part before the alleged sale took place? ICTL, like REL, was engaged in interprovincial road delivery, as an LTL carrier. Thirteen of its 32 employees became REL employees, and 50% to 60% of its business as a going concern was retained by REL. Also certain ICTL equipment used in its business were purchased by REL for its own use. According to the Board, ICTL was clearly operating that part of its federal business that flowed to and was retained by REL.

Were bargaining rights tied to ICTL's business or to any part thereof that was sold? The Applicant was certified by this Board on May 15, 1979 to represent the employees of ICTL (file 555-1118). The certificate was subsequently amended by the Board to change the name of the Applicant to its current name. Bargaining rights were thus tied to ICTL's business which flowed to and was retained by REL.

Has there been an actual sale or transfer within the meaning of the Code of that same business or part thereof to REL? The definition of "sell" contained in section 44 of the Code is purposefully very broad to ensure the protection and permanence of bargaining rights. To do this the Board must also interpret it liberally.

The respondents have made much of the fact that ICTL and REL were competitors in the same market and that ICTL simply picked up and left town abandoning its business. Although superficially this may appear to be the case, both ICTL and REL

are in fact wholly owned subsidiaries of REEL and share a common management. And it was REEL's decision to reorganize the freight operations of REL and ICTL and to implement it. This facilitated REL's acquisition of 50% to 60% of the business "abandoned" by ICTL without entering into formal contracts. REL now carries on the same type of business that it used to carry on, which is increased by approximately 50% to 60% of the former ICTL business as a going concern. This is therefore not a case of genuine loss of business to competitors.

For these reasons, the Board finds under section 46 of the Code that a part of the business of ICTL has been sold to REL.

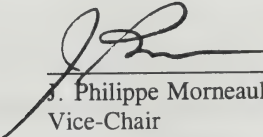
VI

With respect to the Union's main purpose in making this application, i.e. to protect the seniority of its members, the Board is powerless to act. It is undeniable that 13 former ICTL employees have been intermingled with REL employees (there are now 62 drivers at REL) and the Board determines that the pre-existing unit certified by the Board at REL (file 766-2437 as amended in file 530-2130) continues to constitute the one unit appropriate for collective bargaining. It follows that the Teamsters remain the bargaining agent for the employees in the said unit as they retain an overwhelming majority in the unit. (See Québecair et Régionair Inc. (1983), 54 di 161 (CLRB no. 447).) It also follows, pursuant to section 45(2) of the Code, that the collective agreement in force between the Teamsters and REL alone continues to be binding on the Teamsters.

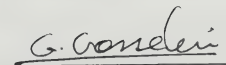
As neither the Teamsters nor REL have made application to the Board pursuant to section 45(3), the Board cannot take in account the seniority provisions contained in section 45(4) and is powerless to act.

VII

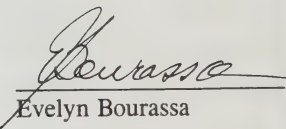
For all the above reasons the Board grants the application (file 585-479) in part and declares that there has been a sale of business between ICTL and REL and that REL is the purchaser of said business.



J. Philippe Morneau
Vice-Chair



Ginette Gosselin
Member



Evelyn Bourassa
Member

information

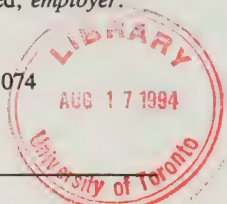
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Summary

Victor Mazarello, *complainant*, and Wackenhut of Canada Limited, *employer*.

Board File: 745-4603
CLRB/CCRT Decision no. 1074
July 22, 1994



This decision deals with a complaint by an employee who alleges that his employer contravened sections 94(1)(a) and 94(3)(e) of the Canada Labour Code.

The complainant alleges employer interference, discrimination and unjust discipline because of his union involvement. The employer denies the allegations.

Normally, complaints of this nature are filed by trade unions. The union, however, advised the Board in this case that the complainant would be representing himself and that it would only appear at the hearing to make representations on matters raised by the parties with respect to the collective bargaining relationship.

The complainant was the chief steward for the employees. His relationship with the employer was a rocky one. Many grievances were filed, and several other incidents occurred between the complainant and the employer.

Résumé

Victor Mazarello, *plaignant*, et Wackenhut of Canada Limited, *employeur*.

Dossier du Conseil: 745-4603
CLRB/CCRT Décision n° 1074
le 22 juillet 1994

La présente décision traite d'une plainte déposée par un employé qui allègue que son employeur a enfreint les alinéas 94(1)a) et 94(3)e) du Code canadien du travail.

Selon le plaignant, l'employeur aurait fait preuve de d'ingérence et discrimination à son égard et lui aurait injustement imposé des mesures disciplinaires en raison de ses activités syndicales. L'employeur nie ces allégations.

Les plaintes de ce genre sont habituellement déposées par des syndicats. Cependant, le syndicat a informé le Conseil en l'espèce qu'il ne représenterait pas le plaignant et qu'il se présenterait à l'audience seulement pour déposer des observations sur des questions ayant trait à la relation de négociation collective soulevées par les parties.

Le plaignant était délégué syndical des employés. Ses rapports avec l'employeur ont toujours été chaotiques. Il y a eu de nombreux griefs, et les parties ont été mêlées à bien d'autres incidents.

The Board concluded that the complaint involved a matter for the grievance-arbitration system. The provisions of section 94 are not intended to resolve work-site disputes, in particular after a collective agreement has been put in place. The Board therefore dismissed the complaint.

Le Conseil conclut que la plainte porte sur une question à trancher par la procédure de règlement des griefs et d'arbitrage. Les dispositions de l'article 94 n'ont pas pour but de régler les conflits sur les lieux de travail et surtout s'il existe une convention collective. Le Conseil rejette donc la plainte.

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Reasons for decision

Victor Mazarello,

complainant,

and

Wackenhut of Canada Limited,

employer.

Board File: 745-4603

Decision no. 1074

July 22, 1994

The Board was composed of Mr. J. Philippe Morneault, Vice-Chair, and Ms. Véronique L. Marleau and Calvin B. Davis, Members. A hearing was held on March 22 to 24, 1994, at Toronto.

Appearances

Mr. Victor Mazarello, complainant, on his own behalf; and

Mr. Gus Sakelos, accompanied by Mr. John Houle, Toronto Branch Manager, for the employer; and

Mr. Steve Vodi, Directing Business Representative, for the union.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

Victor Mazarello, an employee of Wackenhut of Canada Limited, filed a complaint with the Board alleging that the employer contravened sections 94(1)(a) and 94(3)(e) of the Canada Labour Code.

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union..."

The complainant alleges employer interference, discrimination, and unjust discipline because of his union involvement. The employer denies these allegations.

At the time of the filing of the complaint, the International Association of Machinists and Aerospace Workers, Local Lodge 2413 (the union), was certified as bargaining agent. And a collective agreement was in effect from June 26, 1992 to June 25, 1994. The union had not filed any complaint before the Board, nor did it represent Mr. Mazarello in his allegations against the employer.

Normally complaints of this nature are filed by trade unions. For an individual to complain without the support of his union is somewhat rare. Indeed Mr. Mazarello believed that his union would be representing him at the hearing. When he realized that it would not do so, he advised the Board he was not prepared to proceed and requested an adjournment.

The Board granted a one-day adjournment to allow Mr. Mazarello to gather whatever documents he needed as well as to contact witnesses. The Board had on file a letter from Steve Vodi, a union official, advising the Board that the union understood that Mr. Mazarello would be representing himself. Mr. Vodi also made it clear that Mr. Mazarello did not speak for or represent the union. The union intended to appear at the hearing and to make representations on any matter raised by the parties with respect to the collective bargaining relationship.

On the second day, before the hearing started, Mr. Mazarello raised the issue of Mr. Vodi's presence in the hearing room. Mr. Vodi advised the Board that he was there as an interested party, and would only request to speak if a matter that put the union's interests at stake was raised. The Board advised Mr. Mazarello that its hearings were open to the public and anyone could attend and further, that in complaints of this nature, the union was indeed at the least, an interested party. When and if Mr. Vodi chose to make representations, the Board would determine whether or not it would hear him.

Mr. Mazarello has been employed as a security guard at Pearson International Airport Terminal since November 1991. He became a union steward in July 1992, and was elected chief steward in September 1992.

To say the least, the relationship between the employer, and Mr. Mazarello is a rocky one. Mr. Mazarello has filed many grievances on his own behalf and on behalf of other employees against the employer. In some cases, the union proceeded with the grievances, while in others the grievances were considered to be without merit or were deemed not to be a violation of the collective agreement. A grievance regarding overtime filed by Mr. Mazarello was considered by the union, which took it to arbitration. The employer failed to appear at the hearing and subsequently the arbitrator allowed the grievance.

The union also filed a grievance over the transfer of Mr. Mazarello by the employer from the airport to another location. At first the employer refused to rescind the transfer. However, before the grievance proceeded any further, the employer, after discussing the matter with the union, had a change of heart and decided to reinstate Mr. Mazarello in his normal duties at the airport with no loss of seniority or wages. This incident as well as several other problems Mr. Mazarello had with the employer convinced him that the employer was discriminating against him because of his union involvement.

One of the main reasons Mr. Mazarello filed his complaint was the employer's attempt to transfer him even though this incident had already been settled through the grievance procedure whereby he was fully reinstated. Indeed much of Mr. Mazarello's complaint deals with the employer's past actions which were settled through the grievance procedure.

Mr. Mazarello explained to the Board the many problems he had with the employer in addition to the above matters. He told the Board about supervisors working when they were not supposed to, supervisors not on duty when required, uneven distribution of overtime with new people getting the overtime, people accommodated to work preferred shifts while the employer would not accommodate his shift preference, and individuals favoured over him to work at certain times.

The incidents between the employer and Mr. Mazarello appear endless. Mr. Mazarello was accused of threatening the employer's staff while Mr. Mazarello himself claims to have been threatened. Name-calling had occurred between individuals. Mr. Mazarello filed complaints with the RCMP and the Ministry of Transport against the employer and/or its representatives. The employer filed a complaint with the RCMP against Mr. Mazarello.

Section 98(3) of the Code gives the Board discretion to refuse to hear a complaint made pursuant to section 97 of the Code if, in its opinion, the dispute giving rise to the complaint could be dealt with through the grievance-arbitration provisions of the collective agreement.

"98. (3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

Over the years the Board set out and developed the criteria for invoking section

98(3). See Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97); Bank of Montreal (Devonshire Mall Branch) (1982), 51 di 160; and 83 CLLC 16,015 (CLRB no. 404); Canada Post Corporation (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426); Canada Post Corporation (1987), 69 di 91 (CLRB no. 620); Canada Post Corporation (1987), 71 di 177 (CLRB no. 652); Wardair Canada Inc. (1988), 76 di 123; and 89 CLLC 16,009 (CLRB no. 722); Canada Post Corporation (1989), 76 di 212 (CLRB no. 729); Canada Post Corporation (1990), 81 di 28; and 12 CLRBR (2d) 117 (CLRB no. 800); Ottawa-Carleton Regional Transit Commission (1990), 81 di 88 (CLRB no. 805); and Québecair (1990), 82 di 190 (CLRB no. 827).

The Board has stated that it would lean towards giving more priority to the private dispute resolution mechanisms that are mandatory in each collective agreement under the Code. This is particularly so where there is a long-standing relationship between the parties, where the dispute arises from their day-to-day operations, and where no important matters of public policy under the Code are at stake.

The Board has in some instances refused to hold a public hearing and has advised the parties that a complaint was a matter for the private grievance arbitration procedure. At other times, after holding a public hearing, the Board has determined that the grievance-arbitration system was the best mechanism to settle the dispute. If the Board deems the complaint to be an important matter of public policy, it will conduct a public hearing and make the appropriate determination.

In this case, the Board felt that although a collective agreement and bargaining relationship were in place, it would like to hear evidence and representations from the parties before determining whether or not Mr. Mazarello's complaints should be dealt with in accordance with the grievance-arbitration provisions of the collective agreement. At the hearing, the Board asked the employer to present its evidence first, in accordance with section 98(4) of the Code which reverses the burden of proof in

the case of a complaint filed pursuant to section 94(3). When its evidence was complete Mr. Mazarello took the stand. He explained at length his problems with the employer. He wished to subpoena several witnesses on his behalf. He explained to the Board that the witnesses would corroborate evidence he had produced. The Board concluded after hearing his evidence and receiving his exhibits that there was nothing in Mr. Mazarello's evidence that showed anything other than the existence of a simple conflict of personalities, and that even if the Board were to hear additional corroborating evidence and even if that evidence had the tenor suggested by Mr. Mazarello, the proper solution resided in the parties' grievance arbitration procedure.

The provisions of section 94 of the Code are not intended to resolve work-site disputes, in particular after a collective agreement has been put in place. That is exactly what the problem is here: there is a hard-nosed employer on one side and an equally adamant job steward on the other side. Events that occurred had at times more to do with personalities than fundamental rights.

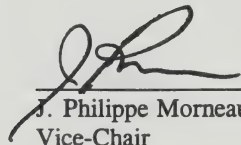


As the Ontario Labour Relations Board put it in Victory Soya Mills, [1989] OLRB Rep. June 653:

"... What we have before us is a simple conflict of personalities and a contest over which party will ultimately turn out to be more stubborn and short-sighted. That is not the kind of situation in which the Board, in its discretion, should be involved. ..."

(page 658)

As to Mr. Mazarello's problems with the police and the Ministry of Transport authorities, there is nothing the Board can do.

The Board is satisfied that the complaint is a matter for the grievance-arbitration procedure and is therefore dismissed.


J. Philippe Morneau
Vice-Chair
Calvin B. Davis
Member
Véronique L. Marleau
Member

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Summary

Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), *applicant*, Maritime Employers' Association, Quebec Ports Terminals Inc., Compagnie d'arrimage Trois-Rivières Ltée, Moorings (Trois-Rivières) Ltd., J.C. Malone and Company Limited, Les Élévateurs de Trois-Rivières, Empire Stevedoring Co. Ltd., and Service de grains Laviolette, *respondents*, and Maritime Data Center, Inc., *mis-en-cause*.

Board Files: 725-344, 725-345,
745-4823, 760-104
CCRT/CCRT Decision no. 1075
July 28, 1994

Résumé

Syndicat des débardeurs de Trois-Rivières, section locale 1375 (SCFP), *requérant*, Association des employeurs maritimes, Terminaux Portuaires du Québec Inc., Compagnie d'arrimage Trois-Rivières Ltée, Compagnie d'amarage (Trois-Rivières) Ltée, J.C. Malone et Compagnie Limitée, Les Élévateurs de Trois-Rivières, Empire Stevedoring Co. Ltd., Service de grains Laviolette, *intimés*, et Centre de données Maritimes Inc., *mis en cause*.

Dossiers du Conseil: 725-344, 725-345,
745-4823, 760-104
CCRT/CLRB Décision n° 1075
le 28 juillet 1994

This is an interim decision issued pursuant to section 20(1) of the Code, which deals with an application for a declaration of unlawful strike, an application for a declaration of unlawful lockout and a complaint of interference in the administration of an employers' organization.

The Board dismissed the application for a declaration of unlawful strike on the grounds that certain stevedores' refusal to carry out work assigned by the MEA did not constitute a concerted activity designed to refuse to work, to stop or to slow down work.

Il s'agit d'une décision partielle du Conseil au sens du paragraphe 20(1) du Code qui traite d'une demande de déclaration de grève illégale, d'une demande de déclaration de lock-out illégal et d'une plainte d'ingérence dans l'administration d'une organisation patronale.

Le Conseil a rejeté la demande de déclaration de grève illégale pour le motif que le refus de certains débardeurs de donner suite aux affectations de l'AEM ne constituait pas une action concertée équivalant à un refus de travailler, ou destinée à arrêter ou à ralentir le travail.



The Board also dismissed the complaint of interference in the administration of an employers' organization since the evidence did not show that the union had agreed with QPT representatives to implement a work assignment procedure that was contrary to the collective agreement.

However, the Board did grant the application for a declaration of unlawful lockout. It concluded that the MEA's decision to stop dispatching workers to 'carry out QPT operations in the port of Bécancour resulted in denying access to employees who had the right to carry out work in accordance with the collective agreement.

The Board acknowledges that ordering an employer to put a stop to the lockout would not settle the dispute involving the MEA and QPT, but only the dispute involving the union and the employer representative. Consequently, the Board asks that the parties file additional submissions on the Board's jurisdiction to deal with these proceedings and on the remedies sought by the MEA and QPT in the application for a declaration of unlawful strike. It reserves its decision on issues raised that concern the application of section 34(7) of the Code.

Le Conseil a également rejeté la plainte d'ingérence dans l'administration d'une organisation patronale puisque la preuve n'a pas démontré que le syndicat avait convenu avec les représentants de TPQ de mettre en place un système d'affectations contraire à celui prévu à la convention collective.

En revanche, le Conseil a fait droit à la demande de déclaration de lock-out illégal. Le Conseil a jugé que la décision de l'AEA de cesser le déploiement de la main-d'œuvre pour les activités de TPQ au port de Bécancour a eu pour effet d'empêcher l'accès à un lieu de travail aux employés qui avaient droit en vertu de la convention collective.

Le Conseil reconnaît qu'une ordonnance enjoignant l'employeur de mettre fin au lockout ne résoud pas le litige qui oppose l'AEA et TPQ, mais seulement celui qui oppose le syndicat et le représentant patronal. Par conséquent, le Conseil demande aux parties des observations supplémentaires sur la compétence du Conseil de trancher ce litige dans le cadre des procédures actuelles et les remèdes recherchés par l'AEA contre TPQ dans le cadre de sa demande de déclaration de grève illégale. Le Conseil se réserve donc une décision sur les questions relatives à l'application du paragraphe 34(7) du Code.

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Local 1375 (CUPE),

applicant,

and

Maritime Employers' Association, Quebec Ports
Terminals Inc., Compagnie d'arrimage Trois-
Rivières Ltée, Moorings (Trois-Rivières) Ltd.,
J.C. Malone and Company Ltd., Les Élévateurs
de Trois-Rivières, Empire Stevedoring Co. Ltd.
and Service de grains Laviolette,

respondents,

and

Maritime Data Centre, Inc.,

mis-en-cause.

Board Files: 725-344, 725-345,
745-4823, 760-104

Decision no. 1075
July 28, 1994

The Board was composed of Ms. Louise Doyon, Vice-Chair, as well as Mr. François Bastien and Ms. Sarah E. FitzGerald, Members.

Appearances

Mr. Claude Héту, accompanied by Mr. Jean-Guy Harnois, for the union;
Mr. Gérard Rochon, accompanied by Ms. Lyne Perron, for the employer;
Mr. André Sasseville, accompanied by Messrs. Jean Gaudreau and Claude Desgagnés,
for Quebec Ports Terminals Inc.; and
Mr. Alain R. Pilotte, accompanied by Mr. Charles Terenzi, for Maritime Data
Centre, Inc.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

Further to the hearing held in Montréal on May 27 and 28, 1994, the Board is issuing this interim decision within the meaning of section 20(1) of the Code.

I

The Board has before it an application for a declaration of unlawful lockout filed by the Syndicat des débardeurs de Trois-Rivières, Local 1375 (the union). It also has before it an application for a declaration of unlawful strike and a complaint of interference with the formation and administration of an employers' organization filed by the Maritime Employers' Association (MEA), the representative appointed under section 34 of the Code.

1. Application for a declaration of unlawful lockout

The union is seeking a declaration from the Board to the effect that the MEA declared a lockout contrary to the Code when, on May 20, 1994, it stopped dispatching the manpower required by Quebec Ports Terminals Inc. (QPT) in order to carry on its longshoring activities in the port of Bécancour, as provided for in the collective agreement in force until December 31, 1994. The union is certified to represent all employees involved in loading and unloading ships and performing other related duties for the employers covered by the geographic certification in effect in the ports of Trois-Rivières and Bécancour. According to the union, this decision led to the closing of a work place, the port of Bécancour, in order to force the employees to agree to a condition of employment, in this case to give up statutory holidays, a benefit provided for in clause 17.07 of the collective agreement.

2. Application for a declaration of unlawful strike and complaint of interference

In reply to the union's application, the MEA applied for a declaration of unlawful strike. The MEA alleged that the union, through its president, Jean-Guy Harnois, entered into an agreement with QPT to introduce a new procedure for dispatching the employees required by QPT. Under this agreement, alleged the MEA, longshoremen with a primary classification at QPT, acting in concert, are refusing to be dispatched by the MEA to the port of Trois-Rivières, claiming they are ill. They are, however, accepting work assignments QPT is offering them directly for the port of Bécancour. According to the MEA, this agreement constitutes interference by the union with the administration of an employers' organization, whereas the refusal by certain longshoremen to be dispatched in accordance with the collective agreement constitutes a strike, these actions being contrary to the Code. The employer representative is asking the Board to order the union and its members to cease contravening the Code.

At the hearing, the MEA sought leave from the Board to amend the conclusions in its application for a declaration of unlawful strike so that the Board could deal with its dispute with QPT which, the MEA alleged, arises from the application of section 34 of the Code. The Board authorized the amending of the application to add conclusions the merits of which would be assessed in the light of the evidence.

These conclusions are as follows:

"(e) ISSUE any additional order the Board deems appropriate to settling the dispute in the circumstances, and more particularly, since the entire dispute involves strictly a question relating to the application of section 34 of the Canada Labour Code, we request the Board, under the powers conferred on it by sections 34(7) and 21 of the Canada Labour Code, to issue the following additional orders:

(i) **REAFFIRM** that QPT is bound as an employer by all provisions of the collective agreement in force between the Maritime Employers' Association and the Syndicat des débardeurs, CUPE Local 1375, which agreement was signed on December 8, 1992 (decision issued on August 16, 1993 - CLRB decision no. 1027).

(ii) **ORDER** QPT to comply with the provisions of said collective agreement and more particularly **ORDER** QPT to pay the Maritime Data Centre, Inc., for each hour worked by the employees governed by this collective agreement, all amounts required, the current hourly rate being set at \$2.05, to constitute the fund necessary for the payment of statutory holidays provided for in article 17 of the collective agreement.

(iii) **ORDER** QPT to post on its premises, in locations that are clearly visible, the following letter:

'Order of the Canada Labour Relations Board of _____

This bulletin has been posted by order of the Canada Labour Relations Board:

1. QPT cannot hire or assign directly employees to perform work covered by the bargaining unit deemed appropriate by the Board in its order of June 12, 1992, which reads as follows:

"all employees involved in loading and unloading ships and other related duties for all employers in the longshoring industry in the geographic region comprised of the Ports of Trois-Rivières and Bécancour."

2. All dispatching for the purpose of performing work for the business managed by QPT must be done according to the dispatching rules set out in the collective agreement signed on December 8, 1992 by the Maritime Employers' Association and the Syndicat des débardeurs, CUPE Local 1375.

3. The Maritime Employers' Association, in its capacity as employer representative, is the only party authorized to negotiate terms and conditions of employment on behalf of all the employers of the employees who perform work covered by the above-described bargaining unit."

The Board also confirmed QPT's status as an interested party in these proceedings, since conclusions are sought against it. However, the Board made clear that the circumstances of the instant case in no way constituted a precedent that gave an employer covered by a geographic certification the right to be considered an interested party during any proceedings involving questions relating to the application of section 34.

Moreover, when the hearing began, the Board reminded the parties that it is applying in their entirety its previous decisions involving the ports of Trois-Rivières and Bécancour, even though some of these decisions are the subject of judicial review applications. These decisions dealt with the questions of the appropriate unit for collective bargaining in the longshoring industry for the ports of Trois-Rivières and Bécancour, the union's geographic certification, the appointment of the MEA as employer representative and the existence of a collective agreement binding the employers covered, including QPT.

II

The facts that gave rise to the filing of the present applications can be summarized as follows.

The Maritime Data Centre, Inc. (MDC) is the paymaster designated in the collective agreement for all employers covered, whose membership in the Centre is mandatory. On March 31, 1994, QPT notified the MDC to stop all payments made on its behalf for statutory holidays until some time in 1995, failing which QPT would itself adjust downward the accounts it received from the MDC. On April 28, 1994, the MDC informed QPT that, if it failed to comply with the collective agreement, effective May 21, 1994 the MDC would stop processing pay for work done by QPT if the latter persisted in its refusal to continue paying for statutory holidays as provided for in the collective agreement. On May 20, 1994, the MDC informed QPT and the other

parties to these proceedings that this processing would cease on May 21 since QPT had not changed its mind.

QPT refused to continue paying for statutory holidays, which it had been doing since the collective agreement came into force in December 1992, because, it argued, these holidays cost too much. It said it is willing to pay a maximum of \$20,000 per year, the amount it has budgeted for this item. However, under the collective agreement, the estimated cost of statutory holidays is some \$42,000. In support of its position, QPT reiterated its claim that the collective agreement was signed without its approval and contrary to its instructions.

On May 20, after being informed of this decision, the MEA formally notified QPT to settle its problem with the MDC and to comply fully with the provisions of the collective agreement, or it would stop providing QPT with dispatching services effective that same day. When QPT did not comply, the MEA stopped dispatching manpower on May 20, as it had announced.

The MEA had known since April 28, 1994 of QPT's position that it would no longer comply with the statutory holidays provisions of the collective agreement because they cost too much. Between April 28 and May 20, 1994, the MEA did not inform the union or prepare a contingency plan should QPT persist in its refusal to pay for statutory holidays in accordance with the collective agreement.

The union was informed on the afternoon of May 20, 1994, by Jean Bédard, MEA vice-president, of the employer representative's decision to halt dispatching. He faxed a notice to the local union and telephoned Robert Lamy, union vice-president, to inform him. Jack Watt, QPT representative, informed Jean-Guy Harnois, union president, of the situation. Mr. Harnois telephoned Mr. Bédard and asked him not to stop dispatching, but he refused. He told Mr. Bédard that, as far as he was concerned, the longshoremen would continue working, regardless of who did the dispatching.

Mr. Bédard replied that if Mr. Harnois sent him a letter specifying that the union would give up payment of statutory holidays, he (Mr. Bédard) would not stop the dispatching. Mr. Harnois refused.

Moreover, Mr. Harnois made clear to Mr. Watt that if he wanted the longshoremen to work, then he had to make arrangements. The situation, said Mr. Harnois, was not his problem. QPT contacted the longshoremen by telephone to assign them work. In some instances, in particular on May 21, 22 and 23, 1994, it assigned work directly to some longshoremen who were already on its premises.

A meeting of the longshoremen who worked in the port of Bécancour was held on May 20, 1994 around 4:00 p.m, when the shift ended. Mr. Harnois informed them of the situation. The longshoremen asked him what attitude they should take and what choices they had. He told them that they had to accept their assignments and that it was their decision where they would go and work, in Trois-Rivières or Bécancour. Following the events on the afternoon of May 20, 1994, the local union officers had no further contact with the MEA representatives.

III

After reviewing and examining the oral and documentary evidence, the Board decided to dismiss the application for a declaration of unlawful strike. Although some longshoremen did not perform the work assignments they were given by the MEA, and although the reason they gave for refusing to do so was not the real reason, that is their assignment to the port of Bécancour, there is no evidence to indicate that these refusals were a concerted action, the intent of which was to refuse to work or to cause a work stoppage or a work slowdown, given the context and the circumstances in which they occurred.

With regard to the complaint of interference by the union with the administration of an employers' organization, the Board found that it had no merit. Neither the union nor its president acted in concert or conspired with QPT representatives to put in place a dispatching procedure that was contrary to the one provided for in the collective agreement. The testimony of the union president is clear in this regard. The fact that there was communication on a number of occasions between QPT representatives and the union officers regarding the availability of longshoremen, although the evidence provided few details of the content and circumstances of this communication, the Board is not convinced that the union interfered with the administration of an employers' organization.

The Board, however, did find that the application for a declaration of unlawful lockout had merit. The MEA's decision to stop dispatching longshoremen to perform QPT's work in the port of Bécancour denied employees access to a work place, access which was their right under the collective agreement. It made this decision during a dispute over the compliance with terms and conditions of employment which QPT wanted to diminish and which the MEA, through its vice-president, indicated that it was prepared to alter in order to continue applying other provisions of the collective agreement, in this case the rules governing dispatching. Mr. Harnois clearly explained to the Board how he, the workers and the union found themselves confronted with a situation which they did not know existed and which would alter the dispatching system unless they agreed to forego the application of a valid condition of employment in order to settle the problem created by decisions made by QPT and the MEA. The MEA's decision forced the employees to accept a condition of employment that was diminished in comparison with the one set down in the collective agreement, in return for the continued application of another of these conditions, namely, the dispatching system.

The Board can appreciate that the MEA's decision to suspend the operation of the dispatching system results from the refusal of an employer bound by the collective

agreement to apply fully said agreement. However, the Board believes that, when the appointed employer representative, which has the status of an employer within the meaning of Part I of the Code, encounters problems relating to compliance with the collective agreement, it cannot make unilateral decisions whose first consequence is to suspend the application of the collective agreement and deny employees their rights. In the present case, the MEA's reaction was particularly hasty, considering that it had known of the problem for several weeks and had done nothing to resolve it and inform the union of the situation.

The Board realizes that the role of employer representative may pose special problems, especially in the present case where an employer continues to resist the application and effects of Board decisions, in particular the negotiation and application in full of the collective agreement. However, this situation does not relieve the employer representative of its obligation to find appropriate solutions to the problems that arise, solutions that promote a stable collective bargaining relationship. The MEA is facing serious and major problems, and while a declaration of unlawful lockout will not resolve the dispute between the MEA and QPT, it will put an end to the dispute between the union and the employer representative. This is why the Board has decided to issue the order that is appended to this decision.

The immediate problem relating to dispatching has been resolved. However, there is still one contentious issue: the on-going question of relations between the MEA and QPT and the problems it poses in the instant case, particularly as regards to the effective application of the remedies the Board has chosen to counter the effects of the unlawful lockout. QPT continues to ignore certain provisions of the collective agreement that binds it and the union. The documentary and oral evidence, in particular the testimony of Captain Claude Desgagnés, has enlightened the Board as to QPT's position and the reasons for its refusal to continue to apply the provisions of the collective agreement. In response to this refusal, the MEA is asking the Board to exercise its powers under section 34(7) and order QPT to comply with the

provisions of the collective agreement and to pay the MDC the required hourly rate of \$2.05 in order to constitute the fund necessary to pay for the statutory holiday provided for in article 17 of the collective agreement. These proceedings thus raise a question relating to the application of section 34 that must be decided.

As the Board has already held, QPT is bound by the collective agreement signed by the employer representative in fulfilment of its obligations arising from geographic certification, just as it binds the employer representative and all the employers it covers. QPT cannot at one point decide, as it pleases, any more than can any other employer concerned, that certain provisions of the collective agreement no longer apply, while the collective agreement is in force.

It is clear to the Board that the dispute between QPT and the MEA raises the question of the application, in the present case, of section 34(7). The Board is so persuaded because this dispute involves consequences and conditions governing the operation of the geographic certification which the Board determined and which resulted in the appointment of the employer representative that signed the collective agreement that one of the employers concerned no longer wishes to observe.

Accordingly, to settle once and for all the dispute between the MEA and QPT and to determine whether section 34(7) applies to the circumstances of the present case, the Board wishes to receive additional written submissions from the parties on the following questions.

"(a) Do the proceedings, as they now stand, enable the Board to settle the dispute between the MEA and QPT?"

"(b) If so, are the remedies that the MEA is seeking in the instant case against QPT justified?"

These additional written submissions must be received by the Board by June 10, 1994.

If a hearing is necessary to complete these submissions, it will be held on June 15, 1994 at a time and place to be determined.

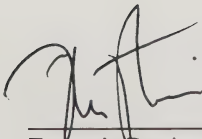
For these reasons, the Board:

- dismisses the application for a declaration of unlawful strike and the complaint of interference with the formation and administration of an employers' organization filed by the MEA;
- allows the application for a declaration of unlawful lockout filed by the union and issues the order appended to this decision;
- reserves its decision on the questions relating to the application of section 34(7) of the Code in the instant case.

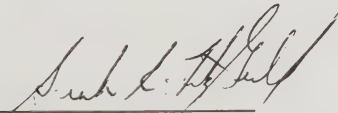
The Board decided that there is no need, at this time, to file in Federal Court a copy of its decision and of the attached order.



Louise Doyon
Vice-Chair



François Bastien
Member



Sarah E. FitzGerald
Member

Information

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Summary

Maritime Employers' Association, *applicant*, Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), *respondent*, and Quebec Ports Terminals Inc., Compagnie d'arrimage Trois-Rivières Ltée, Moorings (Trois-Rivières) Ltd., J.C. Malone and Company Limited, Les Élévateurs de Trois-Rivières, Somavrac, Équipements Thomas Bellemare Ltée, Empire Stevedoring Co. Ltd., and Service de grains Laviolette, Maritime Data Center, Inc., *mis-en-cause*.

Board File: 725-345

and

Maritime Employers' Association, *applicant*, and Quebec Ports Terminals Inc., *respondent*.

Board File: 553-2

CCRT/CLRB Decision no. 1076
July 28, 1994

Résumé

Association des employeurs maritimes, *requérante*, Syndicat des débardeurs de Trois-Rivières, section locale 1375 (SCFP), *intimé*, et Terminaux Portuaires du Québec Inc., Compagnie d'arrimage Trois-Rivières Ltée, Compagnie d'amarage (Trois-Rivières) Ltée, J.C. Malone et Compagnie Limitée, Les Élévateurs de Trois-Rivières, Somavrac, Équipements Thomas Bellemare Ltée, Empire Stevedoring Co. Ltd., Service de grains Laviolette, Centre des données Maritimes Inc., *mis en cause*.

Dossier du Conseil: 725-345

et

Association des employeurs maritimes, *requérante*, et Terminaux Portuaires du Québec Inc., *intimée*.

Dossier du Conseil: 553-2

CCRT/CLRB Décision n° 1076
le 28 juillet 1994

These reasons deal with an application filed pursuant to section 34 of the Code by the MEA on June 10, 1994. The applicant is asking the Board to settle the dispute involving the MEA and QPT concerning its interpretation of the meaning and scope of the provisions of the collective agreement on statutory holidays and QPT's obligations in this regard.

Les présents motifs traitent d'une demande fondée sur l'article 34 du Code présentée par l'AEM le 10 juin 1994 pour faire trancher le litige qui l'oppose à TPQ quant à son interprétation du sens et de la portée des dispositions de la convention collective régissant les congés statutaires et les obligations de TPQ à cet égard.



The dispute was first brought to the Board's attention in May 1994 when several applications were filed. The Board dealt with some of these applications in a decision issued on June 3, 1994.

The Board decided to grant the MEA's application. It concluded that it had the authority pursuant to section 34(7) of the Code to settle this dispute which deals with the rights and obligations of the employer representative and the employers covered by a geographic certification. The Board deems that the dispute is not a simple financial matter involving the employer representative and the employers, but rather a labour relations issue concerning the interpretation, application and administration of the collective bargaining relationships in the longshoring industry, resulting from section 34 of the Code.

The Board concluded that QPT's decision to substitute its interpretation to that of the MEA with respect to the financial obligations resulting from article 17.07 of the collective agreement constitutes a refusal to live up to the role conferred to the employer representative appointed by the Board regarding the interpretation, application and administration of the collective agreement, on behalf of all employers in the port of Trois-Rivières/Bécancour. Furthermore, the Board determined that QPT's decision affected the smooth operation of the geographic certification granted pursuant to section 34 of the Code.

Ce litige a d'abord été porté à l'attention du Conseil dans le cadre de demandes présentées en mai 1994. Le Conseil a tranché les demandes en partie dans une décision rendue le 3 juin 1994.

Le Conseil a décidé de faire droit à la demande de l'AEM. Il a déterminé qu'il a la compétence en vertu du paragraphe 34(7) du Code pour trancher le présent litige qui porte sur les droits et obligations respectives représentant patronal et des employeurs visés par une ordonnance d'accréditation géographique. Le Conseil estime qu'il ne s'agit pas d'une simple réclamation financière entre le représentant patronal et les employeurs, mais plutôt d'une question de relations de travail qui concerne l'interprétation, l'application et l'administration du régime de rapports collectifs de travail dans le secteur du débardage découlant de l'article 34 du Code.

Le Conseil a jugé que la décision de TPQ de substituer son interprétation à celle de l'AEM quant aux obligations financières découlant de la clause 17.07 de la convention collective constitue un refus de respecter le rôle du représentant patronal désigné par le Code d'interpréter, d'appliquer et d'administrer la convention collective au nom de tous les employeurs du port de Trois-Rivières/Bécancour. Le Conseil a également déterminé que la décision de TPQ a porté atteinte au bon fonctionnement du régime d'accréditation géographique de l'article 34 du Code.

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MAINTENANT ACCESSIBLES DANS QUICKLAW.

In accordance with the remedial powers conferred by section 21 of the Code, the Board orders QPT to comply again with the MEA's requirements resulting from the interpretation and application of article 17.07 of the collective agreement.

En vertu des pouvoirs réparateurs qui lui sont conférés en vertu de l'article 21 du Code, le Conseil ordonne à TPQ de se conformer à nouveau aux exigences posées par l'interprétation et l'application de la clause 17.07 de la convention collective faites par l'AEM.

Reasons for decision

Maritime Employers' Association,

applicant,

and

Syndicat des débardeurs de Trois-Rivières,
Local 1375 (CUPE),

respondent,

and

Quebec Ports Terminals Inc., Compagnie
d'arrimage Trois-Rivières Ltée, Moorings
(Trois-Rivières) Ltd., J.C. Malone and
Company Limited, Les Élévateurs de Trois-
Rivières, Somavrac Inc., Équipements Thomas
Bellemare Ltée, Empire Stevedoring Co. Ltd.,
Service de grains Laviolette, and Maritime Data
Centre, Inc.,

mis-en-cause.

Board File: 725-345

Maritime Employers' Association,

applicant,

and

Quebec Ports Terminals Inc.,

respondent.

Board File: 553-2
CCRT/CLRB Decision no. 1076
July 28, 1994

Appearances

Mr. Claude Hétu, accompanied by Mr. Jean-Guy Harnois, for the union;
Mr. Gérard Rochon, accompanied by Ms. Lyne Perron, for the employer;
Mr. André Sasseville, accompanied by Messrs. Jean Gaudreau and Claude Desgagnés,
for Quebec Ports Terminals Inc.; and
Mr. Alain R. Pilotte, accompanied by Mr. Charles Terenzi, for the Maritime Data
Centre, Inc.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

THE PROCEEDINGS

These reasons for decision are further to the Board's letter decision no. 1298 dated June 3, 1994, which has now been issued in the form of Reasons for decision (Association des employeurs maritimes et autres (1994), as yet unreported CLRB decision no. 1075). In that letter decision, it dealt with several applications that had been filed in May 1994 following a dispute involving, among other parties, the Maritime Employers' Association (MEA), the Syndicat des débardeurs de Trois-Rivières, Local 1375 (the union), and Quebec Ports Terminals Inc. (QPT). A hearing was held in these proceedings in Montréal on May 28 and 29, 1994.

In its June 3 decision, the Board allowed the application for a declaration of unlawful lockout filed on May 24 by the union and ordered the MEA to resume dispatching the manpower required by QPT in order to carry out its operations in the port of Bécancour. The dispatching of manpower for these operations was halted on May 21, 1994, after QPT refused to comply with the interpretation given by the MEA to certain provisions of the collective agreement.

Moreover, the Board, in that decision, dismissed a complaint of unfair labour practice, in which the MEA alleged that the union had contravened section 95(c) of the Code, and an application for a declaration of unlawful strike filed by the MEA in response to the union's application for a declaration of unlawful lockout.

Furthermore, the Board did not deal in that decision with the MEA's request to amend the conclusions sought in its application for a declaration of unlawful strike (file 725-345). The purpose of MEA's amendment was to have the Board settle its dispute with QPT concerning its interpretation of the meaning and scope of the statutory holidays provisions of the collective agreement and QPT's obligations under these provisions. These Reasons for decision deal with this question.

The MEA requested on June 10, 1994 (file 553-2) that the Board exercise the powers conferred by sections 34(7) and 21 of the Code in order to settle its dispute with QPT.

As indicated in the Board's decision of June 3, it was QPT's refusal to continue paying its full share of the cost of statutory holidays that led the MEA, on May 21, 1994, to suspend the dispatching of the manpower required by QPT in the port of Bécancour. In that decision, the Board stated that, although its intervention resolved the immediate problem between the union and the MEA relating to dispatching, the dispute between the MEA and QPT was, for its part, still ongoing and posed problems that prevented the effective and lasting implementation of the remedies the Board had already ordered to counter the effects of the unlawful lockout, namely, the resumption of dispatching.

Before deciding the merits of the MEA's request for amendment, the Board requested additional written submissions from the parties on the following questions:

- (a) Do the proceedings, as they now stand, enable the Board to settle the dispute between the MEA and QPT?

(b) If so, is the remedy that the MEA is seeking in the instant case against QPT justified?

In its written submissions, the MEA argued that, even though the amended conclusions sought were presented as part of a section 91 application, the Board could entertain and consider them as a separate application and exercise the powers conferred by section 34(7) of the Code. Should the Board not proceed in this manner, the MEA argued that the Board must treat its written submissions as a new formal application requesting the Board to make the following orders:

"1. REAFFIRM that QPT is bound as an employer by all provisions of the collective agreement in force between the Maritime Employers' Association and the Syndicat des débardeurs, CUPE Local 1375, which agreement was signed on December 8, 1992 (decision issued on August 16, 1993 - CLRB decision no. 1027).

2. ORDER QPT to comply with the provisions of said collective agreement and more particularly ORDER QPT, in accordance with article 20 of the collective agreement in force, to take the necessary steps to re-establish its status as a member of the MDC so that the latter can again function as the central pay office for both QPT and all other employers in the port of Trois-Rivières/Bécancour and, to this end:

(a) ORDER QPT to withdraw its March 31, 1994 directive to the MDC to cease all payments made on its behalf towards statutory holidays.

(b) ORDER QPT to issue a letter of guarantee to cover its financial obligations to the MDC under the same terms and conditions as those of the letter of guarantee issued previously.

(c) ORDER QPT to pay and continue paying the MDC its share of the fund necessary to pay for the statutory holidays provided for in article 17 of the collective agreement in force, for all hours worked since May 22, 1994, said share currently being set for all employers in the port of Trois-Rivières/Bécancour at a rate of \$2.05 for each

hour of work carried out for each of the employers by the employees governed by the collective agreement in force. "

(translation)

In answer to the second question, the MEA replied that both the facts of the case and the powers conferred on the Board by section 34(7) allow it to grant the remedies sought.

For its part, QPT argued that the Board, which has before it a section 91 application, can grant only those remedies provided for in section 91 and cannot make any order in respect of QPT because QPT is not named in this application. QPT further argued that the request to amend the findings in the original application can be neither considered nor decided because this request was dismissed on June 3.

A public hearing was held on June 15, 1994 to hear the parties' final submissions on these questions.

At the hearing, the Board dealt first with the timeliness of the MEA's new application. The MEA asked the Board to consider and determine all questions before it, including its application of June 10, 1994. QPT argued that this was a completely new application and that there was no urgency in hearing it, should the Board decide to entertain it. QPT asked the Board to postpone the hearing and reconvene later, if necessary.

The Board decided that, although this application was filed in a different procedural context, it did not raise any new questions of which the parties had no knowledge and which would have taken them by surprise were it to be heard forthwith on the merits. The Board therefore decided to combine the files and hear them forthwith. In fact, the findings sought in the June 10 application are, apart from a few details, identical with

the amended findings presented as part of the application for a declaration of unlawful strike. The parties, moreover, raised these questions at the hearing on May 29, 1994.

Furthermore, the Board decided to include in file 553-2 the documentary and oral evidence produced at the hearing on May 28 and 29 concerning the applications for declarations of unlawful strike and lockout. This evidence dealt, among other things, with the circumstances of QPT's decision to stop complying with certain provisions of the collective agreement. QPT presented additional evidence regarding the terms and conditions of membership in the Maritime Data Centre, Inc. (MDC).

II

THE CONTEXT

It is useful, for a clearer understanding of this case, to describe briefly the context of labour relations in the port of Trois-Rivières and Bécancour.

The Syndicat des débardeurs, Local 1375 (CUPE), has been certified pursuant to section 34 of the Code, since June 12, 1992, to represent the following group of employees:

"all employees involved in loading and unloading ships and other related duties for all employers in the longshoring industry in the geographic region comprised of the Ports of Trois-Rivières and Bécancour."

QPT is one of the employers covered by that certification and is the only employer carrying out work in the port of Bécancour.

Section 132, now section 34, of the Code, which establishes a system of so-called geographic certification in the longshoring industry, was introduced into the Code in 1973. At that time, it read as follows:

"132.(1) Where employees are employed in

(a) the long-shoring industry, or

(b) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board,

the Board may determine that the employees of two or more employers in such an industry in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

(2) No recommendation shall be made by the Board pursuant to paragraph (1)(b) unless the Board, upon inquiry, it is satisfied that the employers engaged in an industry in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.

(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall order that

(a) one agent be appointed by the employers of the employees in the bargaining unit to act on behalf of those employers; and

(b) the agent so appointed be appropriately authorized by the employers to discharge the duties and responsibilities of an employer under this Part."

The history of this provision and its application over the years are well summarized in a number of Board decisions, in particular in Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRBR no. 642). In that decision, the Board held that the appropriate unit for the Trois-Rivières/Bécancour area was the unit comprising the employees of the employers engaged in longshoring activities in the two ports of Trois-Rivières and Bécancour.

Section 34 was amended on December 5, 1991, in the midst of a lengthy strike in the port of Trois-Rivières/Bécancour. Parliament intended at the time to establish a mechanism designed to resolve the impasse between the parties that resulted specifically from QPT's refusal to recognize the effects of the 1987 geographic certification, in particular the power of the agent appointed under section 34(3)(a) to enter into a collective agreement for and on behalf of the employers concerned. In Quebec Ports Terminals Inc. et al. (1992), 89 di 153; and 93 CLLC 16,035 (CLRb no. 967), the Board described in detail the circumstances that led to these legislative amendments and relates the history of labour relations in the port of Trois-Rivières/Bécancour.

Section 34 was amended in order to repeal subsection (3) and replace it with the following provisions:

"34. (3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall, by order,

(a) require the employers of the employees in the bargaining unit

(i) to jointly choose a representative, and

(ii) to inform the Board of their choice within the time period specified by the Board; and

(b) appoint the representative so chosen as the employer representative for those employers.

(4) Where the employers fail to comply with an order made under paragraph (3)(a), the Board shall, after affording to the employers a reasonable opportunity to make representations, by order, appoint an employer representative of its own choosing.

(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf

of all the employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.

(6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts.

(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative."

Further to these amendments and numerous new developments also described in Quebec Ports Terminals Inc. et al. (967), *supra*, the employers concerned were unable to agree on the choice of the employer representative provided for in section 34(3)(a). That impasse led the Board, in October 1992, to enunciate the criteria it would use to appoint an employer representative and went on to appoint the MEA over QPT's opposition (see Quebec Ports Terminals Inc. et al. (1992), 89 di 194; and 93 CLLC 16,036 (CLRB no. 968)). QPT then applied to the Federal Court of Appeal for judicial review of that decision. The application is still pending (file no. A-1548-92).

On December 8, 1992, the MEA and the union signed a collective agreement that expires on December 31, 1994. Since QPT refused to recognize that it was bound by the collective agreement, the MEA asked the Board, on April 14, 1993, to determine pursuant to section 65 of the Code whether the collective agreement was binding on QPT. It also asked the Board to determine whether, under section 34(7), the MEA had the authority to enter into, on behalf of QPT, a collective agreement that did not have QPT's prior approval. On August 16, 1993, the Board found that the collective agreement was binding on the employer representative, all employers, including QPT, and all employees in the bargaining unit (see Maritime Employers' Association (1993), 92 di 135; and 94 CLLC 16,027 (CLRB no. 1027)). The Board thus rejected QPT's arguments that it was not bound by the collective agreement since said

agreement was signed without its approval. Given this finding, the Board saw no need to deal with the section 34(7) application. QPT also applied for judicial review of that decision, and the application is still pending (file no. A-513-93).

III

THE MATTER AT ISSUE

The dispute that the MEA is asking the Board to settle arises from QPT's decision to stop paying the MDC, the paymaster for the employer representative, its full share of the fund constituted by all employers to pay for the statutory holidays provided for in clause 17.07 of the collective agreement. This clause reads as follows:

Article 17 - Statutory holidays

"17.07 The amounts owed each employee are charged at each pay at the rate of 5% and credited to a maximum of \$1680 for 1992, \$1713.60 for 1993 and \$1748 for 1994. When one of these days is taken, the equivalent of eight (8) hours at the base rate will be paid to the employee. At the end of the year, the balance, if any, is paid to the employee and any negative balance is cancelled. If, when a statutory holiday is taken, the employee's credit cannot cover the equivalent of eight (8) hours at the base rate, the Maritime Employers' Association, in order to make up the difference, will advance the amount required and will subsequently recover this amount directly from the amounts applied to said credit."

(translation)

Since the collective agreement came into force on December 9, 1992, each employer, including QPT, has been paying \$2.05 for each hour worked in order to constitute the fund used to pay for the 10 statutory holidays to which each employee is entitled every year.

This hourly amount of \$2.05 was determined as follows. The total amount to be paid to all employees for statutory holidays is divided by the estimated total number of hours of work for the year in question, this total being determined in the fall and transmitted to the MDC by each employer covered by the geographic certification. The MDC then determines the applicable rate, currently \$2.05, taking into account the rates of pay specified in the collective agreement, mandatory employment-related costs such as unemployment insurance premiums and pension contributions, vacations and the administration fees charged by the MDC, namely, 1% of the total. If, at the end of the year, funds paid by the employers fall short of the total cost of statutory holidays, employers are assessed additional sums using the same formula of the number of hours estimated by each employer. If there is a surplus, overpayments would be remitted to the employers, again using the same formula.

The MDC is a non-profit corporation which has acted, since 1969, as paymaster for various companies operating in the longshoring industry in Ontario, Quebec and the Maritimes. In the port of Trois-Rivières/Bécancour, the MDC acts as the central pay office under the terms of clause 20.01 of the collective agreement:

Article 20 - Central Pay Office

"20.01 The employers represented by the Maritime Employers' Association that carry out work governed by this agreement are also members of the Maritime Data Centre. The Centre acted as the central pay office and issues weekly a single cheque in payment of wages to the employees, in accordance with the provisions of this collective agreement, for the full term of said agreement."

(translation)

The MDC's clients are not all members of the MEA. QPT, for one, is not. Before the collective agreement came into force, the MDC acted as paymaster for QPT for its

operations in the ports of Pointe-au-Pic, Gros Cacouna, Havre St-Pierre and Rimouski.

The companies that do business with the MDC must be members of the MDC; there is a one-time membership fee of \$500. To finance its activities, the MDC collects administration fees equivalent to 1% of the total payroll of each company. Companies associated with MDC members can also use the Centre's services. Affiliated with the Desgagnés Group, which is a member of the MDC, QPT is one such company. Although QPT is not a member of the MDC, it must nevertheless pay its share of administration fees. Like all users, QPT must also sign annually an irrevocable letter of guarantee to ensure fulfilment of its financial obligations, in this case the wages and other benefits provided for in the collective agreement.

In order to pay wages and other benefits provided for in the collective agreement, the MDC bills the employers weekly for the amounts owed the employees at their employ. The invoice includes, among other things, the sum of \$2.05 for each hour worked, which sum is applied to the payment of statutory holidays. To this end, the MDC deposits in trust each week 5% of the wages of each employee in order to constitute the employee's personal credit used to pay for statutory holidays, up to the maximum provided for in clause 17.07 of the collective agreement for a given year. When an employee takes a statutory holiday, he is paid for this holiday directly from this credit. If this credit is insufficient, the MEA makes up the difference, in accordance with clause 17.07. It reimburses itself as the weekly payments are made on behalf of this employee. In fact, the MDC, as paymaster, makes this payment on behalf of the employer representative, which is a signatory to the collective agreement, just as it does when it pays weekly wages and all other benefits.

On March 31, 1994, QPT advised the MDC that it was stopping payment of its share of the cost of statutory holidays, which payment it had been making since the collective agreement came into force. QPT claimed that the annual maximum of

\$20,000 already budgeted for had been greatly exceeded during the first 15 months of the collective agreement because it had already paid more than \$42,000. QPT therefore asked the MDC to stop making on its behalf all payments towards statutory holidays.

QPT's decision was communicated to the MDC following a meeting of the employers in the port of Trois-Rivières/Bécancour. This meeting, convened by the MDC, took place on March 25, 1994. At the meeting, the participants discussed the \$2.05 rate and the possibility of revising it, if necessary, in the light of the number of hours worked estimated in the fall of 1993 and the actual figures for the early months of 1994. After discussion, some employers revised their projections regarding hours of work, which meant that the rate was not changed. Captain Claude Desgagnés, who has been vice-president of QPT for a number of years, stated that it was at this meeting that he first learned of the existence of the \$2.05 rate and that, after calculating the related costs, he decided to stop payment.

On April 28, the MDC informed QPT that it could not stop making the payments because all employers had to pay their share of the cost of the financial provisions of the collective agreement, be it wages or benefits, including statutory holidays. When QPT refused to pay it the required amounts, the MDC informed QPT that it would stop processing, effective May 21, the pay of the employees carrying out work for QPT, unless it received the amounts outstanding. When QPT persisted in its refusal, the MDC informed QPT, the union and the MEA on May 20 that it would stop processing pay effective May 21. Moreover, on May 20, in order to recover QPT's payments towards statutory holidays, which payments had been outstanding since March 31, the MDC redeemed the letter of guarantee. Since the pay period commencing on May 21, QPT has itself processed the pay of the employees assigned to the port of Bécancour. In fact, employees who used to receive a single pay cheque now receive two, contrary to the compensation and single pay processing system provided for in the collective agreement.

Given this situation, the MEA decided on May 20 to stop dispatching, effective May 21, the manpower required by QPT. Since the MDC had stopped serving as paymaster, no funds were subsequently provided by QPT under the collective agreement to pay the wages and other benefits as compensation for the work carried out by the manpower dispatched by the MEA for the benefit of QPT.

IV

THE POSITIONS OF THE PARTIES

1. The MEA's Position

The MEA argued that the present situation results from QPT's unilateral decision to shirk its employer obligations and that to fully resolve the dispute, the Board must intervene pursuant to the powers conferred by sections 34(7) and 21 of the Code. Although the dispatching of manpower had resumed in compliance with the Board's order to this effect, the MEA argued that the problems that required the Board's intervention persist, and that the Board must now settle them.

The MEA alleged that this dispute relates to both the interpretation and the application of the collective agreement and the Code. According to the MEA, QPT's decision amounts to a refusal to recognize its status as employer representative, whose role, as defined in section 34(5) of the Code, includes interpreting and applying the collective agreement. QPT's decision therefore threatens the proper functioning of the certification system applicable to the longshoring industry.

In short, the MEA submitted that the crux of this dispute is not a simple financial claim over which the Board allegedly lacks jurisdiction, but rather the very foundation of the system of collective labour relations provided for in section 34 of the Code and in operation in the port of Trois-Rivières/Bécancour.

The MEA argued that, in order to exercise its jurisdiction to determine the present question which arises with respect to the application of the geographic certification system, the Board must exercise the powers conferred by section 21 of the Code to remedy the harmful effects of QPT's actions. Without the Board's intervention to settle this dispute once and for all, the resumption of normal activities in the port of Trois-Rivières/Bécancour, in particular the dispatching of manpower, results in the other employers in the port having to assume a financial risk because QPT is not paying its full share of the cost of statutory holidays.

2. QPT's Position

QPT presented its arguments without prejudice to the applications for judicial review (see pages 9-10 of these reasons), which applications challenge the validity of two Board decisions: one appointing the MEA as employer representative pursuant to section 34(7) of the Code (Quebec Ports Terminals Inc. et al. (968), *supra*); the other declaring that QPT is bound by the collective agreement (Maritime Employers' Association (1027), *supra*).

QPT argued first that the dispute boils down to a simple financial claim involving the sharing, by the employers, of the financial obligations imposed by the collective agreement. It disagreed with the MEA's interpretation of how the collective agreement divides these obligations. Moreover, QPT questioned the fairness of the cost-sharing formula contained in the collective agreement. It maintained that this formula to the extent it relates to the frequency of its activities in the port in comparison with those of the other employers is unfair to QPT.

QPT further alleged that the Board lacks jurisdiction under section 34(7) of the Code to settle a dispute involving a civil matter because jurisdiction over claims of this type rests with the ordinary courts of law. Subsidiarily, QPT argued that if section 34(7) can be interpreted as conferring on the Board the power to settle a dispute of a civil

nature, then this provision is unconstitutional. Section 101 of the Constitution Act, 1867, does not empower Parliament to create federal tribunals having jurisdiction in civil matters because such matters fall within provincial jurisdiction under section 92(14) of said Act.

Finally, QPT argued that grievance arbitration is the appropriate recourse because the dispute relates to the interpretation and application of the collective agreement. Had the MEA paid the cost of statutory holidays in place of QPT, as it should have done as signatory to the agreement, the union would have filed grievances when the fund was depleted and an arbitrator would have settled these grievances in accordance with the normal procedure.

V

DECISION

In order to settle the dispute between the MEA and QPT, the MEA asked the Board to exercise the powers conferred by the Code, specifically, to apply section 34(7). This section empowers the Board to deal with any question relating to the application of section 34, including the question of the choice and appointment of the employer representative. To the same end, the MEA is also asking the Board to exercise its powers under section 21 of the Code.

1. The Statutory Argument

At the outset of the hearing, the Board informed the parties that it would deal with all matters before it in the light of earlier decisions issued concerning the port of Trois-Rivières/Bécancour. These decisions include Quebec Ports Terminals Inc. et al. (967), supra, pages 160; and 14,260, in which the Board certified the union to represent the bargaining unit described at page 6 of these reasons; Quebec Ports Terminals Inc. et al. (968), supra, in which the Board appointed the MEA as employer representative;

and Maritime Employers' Association (1027), *supra*, in which the Board declared, among other things, that QPT is bound by the collective agreement.

An examination of the application of section 34(7), of the questions that the Board may have to determine, or of its powers under this provision, must necessarily include an examination of the general scheme and peculiarities of the labour relations system in the longshoring industry.

The geographic certification system is at the very heart of collective labour relations in the longshoring industry. Geographic certification is a major departure from traditional certification, if only because sections 34(1), (3) and (5) include within a common bargaining structure employers that also continue to compete with one another in the marketplace. To the existing employer-union structure of collective labour relations, geographic certification adds a new element: the single employer-employers structure. The former structure is conventional in terms of form and operation: collective bargaining is intended, under the provisions of the Code, to establish to some degree a balance of power between the parties. The latter structure is exceptional in that it requires that businesses that vary widely in size, get together and co-operate to define and reconcile their interests with respect to labour relations matters.

These somewhat theoretical considerations are important to the extent that they reveal, as inherent in the system of negotiating and administering collective agreements in the longshoring industry, a dynamic which, if not openly confrontational, is at the very least latently adversarial, not only between the traditional parties, i.e., the employer and the union, but also between the components of one of the parties, in this case the employer.

Under section 33 of the Code, in all sectors of the economy under federal jurisdiction there are voluntary associations of employers (even in the longshoring industry,

section 34 notwithstanding). These associations are formed to address more effectively the special problems employers face, particularly in the longshoring industry (see Prince Rupert Grain Ltd. (1994), as yet unreported CLRB decision no. 1050, for an account of the evolution of the employer bargaining structure in the Prince Rupert area). In these cases, administering the system is simpler and the Board's role is more passive, especially when it comes to appointing an employer representative (see in this regard section 33 of the Code).

Such is not the case, however, in the St. Lawrence ports where employer associations have always been established pursuant to section 34. In the case of labour relations in the port of Trois-Rivières/Bécancour, the Board has played, to say the least, an active role, as evidenced by a number of decisions involving this port. QPT has never accepted the Board's decisions concerning the MEA's geographic certification and appointment as employer representative. The numerous proceedings instituted by QPT in various jurisdictions have delayed by several years the concluding of a first collective agreement that would apply to both shores of the port. Moreover, as a result of the many hearings the Board held in connection with these disputes, the nature and scope of the labour relations system in this industry and the Board's powers in relation to this system have been more clearly defined.

This is the context in which the Board must specifically establish which questions it can determine under section 34(7).

Prior to the enactment in 1991 of the existing text of section 34 (the background to which the Board describes in Quebec Ports Terminals Inc. et al. (967), *supra*), doubt may have persisted as to the exact nature of the system and the powers the Board enjoyed with respect to its establishment and operation. The structure of the system is now settled, as is its general method of operation.

QPT argued that the only questions that can arise and that the Board can determine under section 34(7) are the questions expressly defined in the other subsections of this section. The interpretation "rule of effectivity" leads the Board to conclude otherwise, namely, that Parliament did not add subsection (7) merely to reaffirm jurisdiction that the Board already possessed. In order to give full meaning and effect to this provision, the Board must, on the contrary, interpret subsection (7) as conferring on the Board the necessary jurisdiction to determine any other question that is not expressly defined elsewhere in section 34, but that can reasonably be expected to arise in administering this geographic certification system (see Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394, at page 410).

It is difficult to believe that Parliament, on the one hand, could have created a special labour relations system without, on the other hand, giving in the body responsible for its implementation the means to ensure that it functions properly. It is interesting in this regard to compare briefly the Board's role in applications for certification filed by councils of trade unions under section 32 with the role conferred under section 34. With respect to the identification of one of the parties, one system is voluntary while the other is not. Both involve nevertheless rather exceptional and often complex cases. They are exceptional certification systems in that they diverge somewhat from the normal rules of certification set down in section 24 and subsequent sections. Sections 32 and 34 give the Board discretion, in certain circumstances, discretion in the actual recourse to an association. Under section 34, it has discretion to appoint the representative; under section 32, it has discretion to accept the representative chosen. In Canadian Broadcasting Corporation (1992), 89 di 1 (CLRB no. 954), affirmed by the Federal Court of Appeal (Canadian Council of Broadcast Unions et al. v. Canada Labour Relations Board et al., judgment rendered from the bench, file no. A-931-92, February 24, 1993 (F.C.A.)), the Board dealt with the nature and scope of this discretion, having particular regard to the special structural arrangements that the certification system provided for in section 32 introduces and to the objectives set out in the Preamble to the Code. The origin and scope of this Board's power are tracked

to the labour relations peculiarities, that inevitably result from the creation of a single superstructure meant to include one or the other party. This also applies to cases like this one.

Thus, the system provided for in section 34 gives the employer representative a decisive role. Those special institutional arrangements which constitute the core of this system could be thwarted if the Board had no power to address and eventually to deal with the questions that arise in the course of its application. Were the Board to accept QPT's argument that the matter at issue here is exclusively within the jurisdiction of the ordinary courts of law, this would mean that Parliament intended to dissociate the implementation of the system from its operation, thereby relieving the Board from any responsibility for the latter.

However, one thing is perfectly clear. The actual operation of such a system can create all kinds of problems, owing in particular to the fact that it compels employers to associate and to choose a single employer to represent the whole group. Depending on the circumstances, this association is achieved easily or with difficulty, but always through the Board's intervention. Depending on the case, the manner in which the coming together of employers occurs strongly influences the behaviour of some of its members towards it, especially once the collective bargaining process has been set in motion. If the past is any guide, certain difficulties relating to the choice of the employer representative could impede the operation of the system where bargaining matters are concerned as well as in the future the administration of the collective agreement. This case is a perfect example of this type of difficulty. It is, to say the least, foreseeable, especially when one considers the circumstances of the enactment of the 1991 amendments. It would be difficult, given this context, not to view section 34(7) as the expression of Parliament's intent to introduce a mechanism designed to ensure not only the implementation, but also the proper functioning, of the system and to give the Board responsibility for settling all problems that could hold it in check.

There are many questions that the application of such a system can raise. These difficulties include the differences of opinion, and ultimately the disputes, over the actual appointment of a representative, and those that may arise in the relations between employers and employer representative, the outcome of which will affect the application of section 34. They also include questions relating to the nature and scope of the rights and obligations of the various players, be it the role of the employer representative and the employers in interpreting and applying the collective agreement, or the rules governing the internal operation of the employer association, insofar as these rules affect collective labour relations. These questions not only are very specialized, but also directly affect the reputation, integrity and viability of the system and the effectiveness of certification orders issued under section 34. These are obviously questions that are determined on a case-by-case basis, having regard to the practical consequences they entail.

In the instant case, QPT stopped making payments towards statutory holidays, payments that it had been making since December 1992. In doing so, it relied on a different interpretation of the collective agreement from that of the "employer representative" appointed under section 34. It chose its own interpretation, arguing that the existing hourly rate exceeded the amount it had itself budgeted for. It thus assumed the role of the employer representative. However, under section 34(5), the employer representative has the necessary powers to discharge the responsibilities of an employer under Part I of the Code.

The employer representative's obligations include negotiating in good faith and entering into a collective agreement. The problems that this obligation has created here are well known (see Quebec Ports Terminals Inc. et al. (1967) and Quebec Ports Terminals Inc. et al. (1968), supra). Once the collective agreement is signed, it must be administered, and hence interpreted and applied, in accordance with the agreements reached at the bargaining table. Did Parliament foresee that disputes might arise between the employer representative and the individual employers? The Board

believes that it did, because this aspect of the collective labour relationship is at the heart of the system (see Maritime Employers' Association (1027), *supra*). The employer counterpart of the certified association is the employer representative, and vice versa: there is only one spokesperson for each side. This principle is the cornerstone of the system of geographic, industry-wide representation established by section 34; its objective is to promote harmonious and stable labour relations, which are the foundation of industrial peace, the ultimate objective. Attaining this objective has once again been jeopardized by QPT's unilateral decision, the effect of which is to negate the single employer representation established by section 34, thereby thwarting the system.

The effect of this attitude on the working conditions of certain employees and on industrial peace in the port is devastating. It denies these employees a share of the compensation provided for in the collective agreement and the benefits of a single pay processing system. The application of the manpower dispatching system, a unique benefit of geographic certification in the longshoring industry, could also be distorted, if not jeopardized.

QPT's action also calls into question the bargaining agent's very ability to administer the collective agreement by ignoring, purely and simply, the interpretation on which the bargaining agent and the employer representative agreed. This type of situation cannot help but cause frustration and disturb industrial peace.

Similarly, the question of what is the employer interpretation that binds the employers is, in the Board's view, a perfectly normal and predictable question. That question can in fact arise at any time. If the Board cannot deal with this question, the integrity and viability of this special system of certification is inevitably endangered. In the instant case, QPT appears to have reverted to its long-standing position of challenging the very idea of an employer association in the ports of Trois-Rivières and Bécancour or, at the very least, to negating its effects.

Moreover, the Board is aware that QPT argued, in support of its position in the instant case, that the hourly rate was established using a formula that penalizes it and that leaves no room for flexibility, even where the result is unfair, as it is allegedly the case here. TPQ therefore believes that it is being unfairly dealt with by the cost sharing formula among the employers for the cost of the statutory holidays provided for in the collective agreement.

In the Board's opinion, Parliament also anticipated, in more than one way, this type of situation. First, it coupled the employer representative's exclusive power with a duty of fair representation: the employer representative must not act in a discriminatory or arbitrary manner or in bad faith. Parliament also provided a recourse that the employers can exercise against their representative if they believe that it is not discharging its obligations in accordance with the requirements of the Code. This recourse is section 34(6). QPT could therefore appeal to the Board under this provision. It has not done so. Of course, it may have reasons to dispute the employer representative's actions, but the solution is not to cease unilaterally to fulfill its employer obligations under the collective agreement.

We now turn to QPT's argument that grievance arbitration is the appropriate recourse here to resolve the dispute. QPT argued that this is in fact a dispute relating to the interpretation and application of the collective agreement. In the Board's opinion, recourse to this dispute resolution mechanism, poses problems in the instant case. The evidence reveals that there is no disagreement between the employer representative and the union over the interpretation and application of the collective agreement. Therefore, there does not appear to be a dispute in the nature of a grievance that could be referred to arbitration under the grievance procedure contained in the collective agreement.

In theory, grievances could be presented against the non-payment of statutory holidays for want of funds, given that QPT did not pay its share of the cost. It appears that the

options then open to the MEA as employer representative would be limited. On the one hand, it could challenge the union's claim, but the reasonableness of this approach might prove questionable, given its own interpretation of the collective agreement. On the other hand, it could plead no contest and be ordered to pay the union the amounts claimed. The employer representative would then be back at square one because the arbitrator's decision would order it to comply with the collective agreement, which it is willing, but unable, to do for want of funds. Thus, its dispute with QPT would not be resolved through the arbitrator's intervention.

The dispute is therefore at a different level. It is an internal employer dispute. It affects the collective agreement and must be settled so as to ensure the effective application of the collective agreement.

The Board finds that the question at issue here is a labour relations question that pertains to the interpretation, application and administration of the system of collective labour relations in the longshoring industry. It is not a simple financial claim arising from a disagreement over the division of financial obligations between the employer representative and the employers concerned. Even though the question that has arisen has financial implications, it does not alter in the circumstances of the present case, the nature of the question to be determined.

2. The Constitutional Argument

The Board has already decided that the question before it is not a civil matter involving a simple financial claim, but rather a question involving collective labour relations, i.e., the type of question that arises in applying section 34 of the Code. Consequently, it concludes that it does not have to decide the merits of QPT's constitutional argument based on its own interpretation of the dispute.

For all these reasons, the Board, after examining all proceedings, evidence and submissions of the parties, allows the MEA's section 34 application. It finds that it has jurisdiction under section 34(7) to determine the question that arises concerning the respective rights and obligations of the employer representative and QPT, particularly as regards the interpretation and administration of the collective agreement.

The Board is also of the opinion that it has the authority to make the appropriate orders since the evidence established that QPT, in deciding to no longer abide by the interpretation given by the MEA to clause 17.07 of the collective agreement, jeopardizes the exercise of the employer representative's powers set out in section 34(5) and hence the very stability of the geographic certification system provided for in section 34 of the Code.

VI

REMEDIES

In an earlier decision, the Board held that QPT is bound by the collective agreement (see Maritime Employers' Association (1027), supra). It therefore seems essential to declare that an individual employer is bound by the interpretation that the employer representative gives to the agreement. If, for any reason, a dispute arises between employers, this dispute must be settled by the employer representative, and its decision will bind the employer in its relations with the union, and all individual employers associated under section 34. All this, of course, is subject to the obligations imposed by section 34(6).

Having said this, the Board must deal with the practical question that arises concerning QPT's refusal to make its full financial contribution to the statutory holidays fund. To this end, the Board must now determine the remedies to be applied

to ensure that the collective labour relations system in the port of Trois-Rivières/Bécancour again functions properly.

Section 21 of the Code gives the Board the power to issue orders to ensure compliance with the Code and its own decisions. It reads as follows:

"21. The Board shall exercise such powers and perform such duties as are conferred or imposed on it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board."

This provision gives concrete expression to Parliament's intent to equip the Board with the powers necessary for the effective application of the rules provided for in the Code, the objective of these rules being to establish sound labour relations and industrial peace within federal works, undertakings or businesses.

The remedial powers described in section 21 are of a general nature, as the Supreme Court of Canada pointed out in Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724, at page 741.

As part of the geographic certification system, section 99(1)(a.1) of the Code gives the Board a specific power to remedy a breach of the duty of fair representation under section 34(6). With regard to the powers necessary to resolve other problems that may arise in applying the collective bargaining system provided for in section 34, including those problems described herein, the Board exercises the powers conferred by section 21 that are necessary to ensure that this system once again functions properly.

The Supreme Court of Canada recognized this in Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722: the

authority for a power to implement an objective of a statute confers the power to order remedies that will attain this objective. In that case, the Court held that the CRTC had the power to reconsider an interim order and to remedy a situation in order to fulfil its role of ensuring that telephone rates are always just and reasonable. Referring to that case in Canadian Pacific Air Lines Ltd., *supra*, the Court said the following:

"... It was the safeguarding of the capacity of the Commission to carry out its central purpose that required that the power to review interim rates be recognized."

(page 746)

Thus, the limits placed on the application of section 21 of the Code by the Supreme Court of Canada in Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board et al., [1984] 2 S.C.R. 412, and Canadian Pacific Air Lines Ltd., *supra*, do not apply in the instant case. In fact, in the circumstances of those cases, a specific remedial power was provided for in the Code and the Board had recourse to section 21 in any case.

Having said this, the Board notes that the general remedial power of section 21 must be exercised in accordance with the principles enunciated by the Supreme Court of Canada in National Bank of Canada v. Retail Clerks' International Union et al., [1984] 1 S.C.R. 269. That case involved a complaint of unfair labour practice, but the approach adopted can be applied to the instant case:

"... it is essential for there to be a relation between the unfair practice, its consequences and the remedy."

(page 288)

This is, moreover, what the Board stated in Canadian Imperial Bank of Commerce (1985), 60 di 19; 10 CLRBR (NS) 182; and 85 CLLC 16,021 (CLRBR no. 499):

"The remedy in each case then must be fashioned keeping in mind the need to re-establish the nature of the balance envisaged by the provisions of the Code, sound labour relations and the need not to punish but to remedy."

(pages 53; 216; and 14,153)

In the light of these principles, the Board has fashioned remedies directly related to the need to ensure that the employer representative appointed under section 34 has the means necessary to discharge the obligations contracted under the collective agreement to which it is a party. The parties will thus be restored to the situation in which they were before QPT committed its unlawful act and it will be possible to ensure that the labour relations system provided for in section 34 of the Code, which system the Board established for the ports of Bécancour and Trois-Rivières, once again functions properly.

This order, transmitted under separate cover, reads as follows:

"WHEREAS the MEA is the appointed employer representative and QPT is bound by the effects of this appointment;

WHEREAS QPT is bound by the collective agreement entered into sfsdfasby the employer representative and the union, which agreement expires on December 31, 1994;

WHEREAS responsibility for interpreting, applying and administering the collective agreement rests with the employer representative under the terms of section 34(5) of the Code;

WHEREAS QPT's decision to stop paying its share, as established by the MEA, to constitute the fund used to pay for statutory holidays is contrary to clause 17.07 of the collective agreement as said clause is interpreted and applied by the employer representative;

WHEREAS QPT did not seek any relief on the ground that the MEA's interpretation breached its obligations under section 34(6) and whereas, on the contrary, QPT made contributions for a number of months;

WHEREAS QPT's decision in this matter has consequences that adversely affect the proper functioning of the certification system provided for in section 34 of the Code;

WHEREAS a dispute arose between QPT and the MEA concerning the amounts QPT was required to pay the MEA in its capacity as employer representative in order to discharge the obligations contracted by the employer under article 17 of the collective agreement;

WHEREAS this dispute constitutes a question which the Board must determine in accordance with section 34(7) of the Code;

FOR THESE REASONS, the Board orders QPT to do the following:

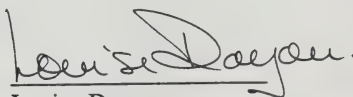
- 1. Take the necessary steps to resume complying with the requirements of clause 17.07 of the collective agreement, as the said clause is interpreted and applied by the MEA and, to this end, to pay and continue paying the MDC its share of the cost of the statutory holidays provided for in article 17 of the collective agreement, for all hours worked since May 22, 1994. This share is currently set by the MEA, for all employers in the port of Trois-Rivières/Bécancour, at the rate of \$2.05 for each hour of work carried out for said employers by the employees governed by the collective agreement.*
- 2. Resume its full and complete participation in the pay processing system that exists for the port of Trois-Rivières/Bécancour, on the same terms and conditions as it participated prior to March 31, 1994."*

The Board designates Ms. Suzanne Pichette, Director of the Board's Montréal regional office, to assist the parties in implementing these remedies.

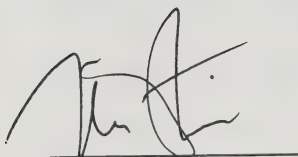
This is an interim decision within the meaning of section 20(1) of the Code.

Should the parties fail to agree on the application of the above remedies, the Board reserves the right to intervene, if necessary, in order to settle the disputed issues arising from the implementation of this decision and to issue any other decision or order required to settle this dispute.

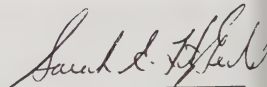
Given the decision issued in file 553-2, the Board closes file 725-345.



Louise Doyon
Vice-Chair



François Bastien
Member



Sarah E. FitzGerald
Member

information

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Summary

Association des employés de Transport V.A. Inc., *applicant*, Cartage and Miscellaneous Employees' Union, Local 931 (Teamsters Quebec), *bargaining agent*, and Transport V.A. Inc., *employer*.

Board File: 555-3641
CCRT/CLRB Decision no. 1077
August 5, 1994

Application for certification. Section 24 of the Canada Labour Code (Part I - Industrial Relations). Raid. Independent association seeking to displace certified union (Teamsters). Allegation of employer domination or influence. Sections 25(1), 8(1), 36(1)(a), 94(1)(a) and 94(3)(g) of the Code. Compliance with requirements for certification challenged. Sections 6(1)(a) and 6(2) (signatures); 23(a) and 24(a) (membership cards) of CLRB Regulations. Application for certification dismissed. Dominated union (CLRB decision no. 1028 was followed).

Dissatisfied employees established an association, and during the same period, one of the organizers was dismissed. The employer negotiated a settlement with the Association and ignored the certified union. A \$1500 compensation package was given to the employee and the sum of \$4950 was allegedly spent on the Association's representative's expenses. These expenses were deemed exorbitant and unwarranted. There were, among other factors, falsified claims, and bank documents which had disappeared. Circumstantial evidence

Résumé

Association des employés de Transport V.A. Inc., *requérante*, Union des employés du transport local et industries diverses, section locale 931 (Teamsters Québec), *agent négociateur*, et Transport V.A. Inc., *employeur*.

Dossier du Conseil: 555-3641
CCRT/CLRB Décision n° 1077
le 5 août 1994

Demande d'accréditation. Article 24 du Code canadien du travail (Partie I - Relations du travail). Maraude. Association indépendante cherche à déloger le syndicat accrédité (Teamsters). Allégation de domination ou d'influence patronale. Dispositions 25(1), 8(1), 36(1)a, 94(1)a et 94(3)g du Code. Formalités de présentation de demande d'accréditation contestées. Dispositions 6(1)a et 6(2) (signatures); 23a) et 24a) (cartes d'adhésion) du Règlement du CCRT. Demande d'accréditation rejetée. Syndicat dominé (la décision du CCRT n° 1028 a été suivie).

Une association a été fondée par des employés insatisfaits. À la même époque, un organisateur de l'association a été congédié. L'employeur a négocié un règlement avec l'association en ignorant le syndicat accrédité. Une indemnité de 1500 \$ a été versée à l'employé et la somme de 4950 \$ a servi à payer les frais du représentant de l'Association. Ces frais ont été jugés exorbitants et injustifiés. Il y avait entre autres de fausses factures, et des documents bancaires avaient disparu. La preuve circonstancielle démontre que l'aide financière



established that financial assistance had been provided in violation of section 25(1). Employer influence was deemed unlawful. The application was therefore dismissed.

The Teamsters alleged that the Association had not complied with the requirements set out in the Board's Regulations. The would-be members of the Association had never been admitted. This allegation was dismissed: an application to become a member is deemed to be evidence of membership (section 24 of the Regulations).

The filing of the application for certification had not been officially authorized. This allegation was dismissed. According to the testimony, the application had been authorized.

est contraire au paragraphe 25(1). L'influence patronale est jugée illégale. La demande est donc rejetée.

Les Teamsters allèguent que l'association n'a pas respecté les formalités prescrites dans le Règlement du Conseil. Les adhérents de l'association n'ont jamais été reçus comme membres. Cette allégation est rejetée. Une demande d'admission équivaut à une adhésion (article 24 du Règlement).

La présentation de la demande d'accréditation n'avait pas été formellement autorisée. Cette allégation est rejetée. La preuve testimoniale démontre qu'il y a eu autorisation.

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Reasons for decision

Association des employés de Transport V.A.
Inc.,

applicant,

and

Transport V.A. Inc.,

employer,

and

Cartage and Miscellaneous Employees' Union,
Local 931 (Teamsters Quebec),

certified bargaining agent.

Board File: 555-3641

Decision no. 1077

August 5, 1994

The Board was composed of Mr. Serge Brault, Vice-Chairman, Ms. Suzanne Handman, Vice-Chair, and Mr. Robert Cadieux, Member. A hearing was held on February 18 and July 6 and 7, 1994, at Montréal.

Appearances

Mr. André Bousquet, assisted by Mr. Raymond Vallée, union representative, for the Association des employés de Transport V.A. Inc.;

Mr. Albert Zoltowski, assisted by Mr. Viateur Audet, president and general manager of Transport V.A. Inc., for the employer; and

Mr. Pierre-André Blanchard, assisted by Mr. Richard Charruau, president, and Mr. Jimmy Mansell, business agent, for the Cartage and Miscellaneous Employees' Union, Local 931 (Teamsters Quebec).

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

The Application

These reasons deal with an application for certification filed by the Association des employés de Transport V.A. Inc. (the Association) to represent a group of employees of Transport V.A. Inc. (V.A. or the employer). The application dates back to September 1993 but was not heard sooner due to adjournments which were granted at the request of the parties involved.

The application constitutes a raid. The applicant is seeking to replace the Cartage and Miscellaneous Employees' Union (Teamsters Quebec) - (the Teamsters) as the bargaining agent.

Two questions are at issue here. First, did the Association meet the certification requirements of the Canada Labour Code (Part I - Industrial Relations) and comply with the 1992 Regulations of the Canada Labour Relations Board? Second, is the applicant an association that is dominated or influenced by the employer, as the Teamsters alleged?

The relevant provisions of the Code read as follows:

"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

...

25.(1) Notwithstanding anything in this Part, where the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired, the Board shall not certify the trade union as the bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that

applies to any such employees shall be deemed not to be a collective agreement for the purposes of this Part.

...

36. (1) Where a trade union is certified as the bargaining agent for a bargaining unit,

(a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;

...

94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

(b) contribute financial or other support to a trade union."

The relevant provisions of the Regulations read as follows:

"6. (1) An application, reply or request to intervene filed with the Board shall be signed as follows:

(a) where it is filed by a trade union, a council of trade unions or an employers' organization, it shall be signed by the president or secretary or two other officers or by any person authorized by the trade union, the council of trade unions, or the employers' organization;

...

(2) For the purpose of subsection (1), an authorization shall be given in writing and filed with the Board.

...

23. In any application relating to bargaining rights,

(a) membership of an employee in a trade union is evidence that the employee wishes to be represented by the trade union as that employee's bargaining agent; ...

...

24. In any application relating to bargaining rights, the Board may accept as evidence of membership in a trade union evidence that a person

(a) has signed an application for membership in the trade union;
... "

II

Evidence

The question of the Association's alleged domination was the focus of the proceedings. The Board heard a dozen employees as well as union officers and management officials describe in detail the origins of the Association and its activities.

The Teamsters have represented the employees of V.A. since 1990. The establishment of the Association stems from the dissatisfaction of the local Teamsters' militants with their union executive. According to the Association's founding members, relations between the Association and their union executive deteriorated, particularly during the year preceding the filing of the application.

In the context of these proceedings, there is little point to be gained in examining at length the origins of these frustrations or their validity. Suffice it to say that these frustrations led local union officers who were V.A. employees to question their Teamsters membership. They considered a few options, including joining other labour organizations or establishing their own association. In the spring of 1993, they

consulted a number of people regarding this matter, and in particular Mr. Raymond Vallée, who now acts as their union representative.

Mr. Vallée was a long time Teamsters union representative. In 1992, they dismissed him. Shortly after returning to work as a truck driver for another company, he had an accident and had to give up this employment for health reasons. He then returned to labour relations, on his own, and offered his services as an adviser to independent associations.

Mr. Vallée testified that V.A. employees approached him directly to advise them on their organizing campaign in the spring of 1993. He stated that he had had no previous contact with the employer or its employees. The evidence on this point is contradictory. Mr. Viateur Audet, president of V.A., recalled receiving a telephone call from Mr. Vallée who asked him for a job as a driver at the beginning of 1993. In his own testimony, Mr. Vallée denied that this conversation took place. He testified that, by January 1993, he had ceased all work as a truck driver following the accident described earlier.

The principal officers of the Association, among the V.A. employees, were in turn Messrs. Pierre Routhier, president, Richard Fleurant and Daniel Beauregard. Of these three, the only employee who still works for V.A. is Mr. Fleurant. Mr. Routhier left the company almost a year ago to establish his own trucking company which is a competitor of V.A. Mr. Beauregard was dismissed at about the same time as the Association filed its application in September 1993. Following negotiations between V.A. and Mr. Vallée, the Association's representative, the grievance filed by Mr. Beauregard and the complaint he filed with the Board were abandoned and settled out of court. Under this settlement, Mr. Beauregard resigned from the company in February 1994 in return for a payment of \$1500. He has since found employment with a competitor of V.A.

According to the Teamsters, the circumstances of this settlement cast doubt on the Association's independence or autonomy in its relations with the employer.

In the course of the Board's hearings, the Teamsters subpoenaed the secretary-treasurer of the Association to appear and to produce all minutes of its meetings, its bank statements and instruments, and its financial statements. The treasurer, Mr. Desjardins, therefore produced all of the documents requested.

However, the sum of nearly \$5000 that the employer paid the Association in February 1994 appears nowhere in the statements produced. In fact, there is no record in the bank documents produced of this amount or of its deposit in the Association's account. The cheque in this amount made payable by the Association to Mr. Vallée's secretary (who is also his daughter-in-law) has disappeared, and the Association's cheque book does not contain any stub for this cheque.

However, Mr. Danis Desjardins, the union treasurer, produced very well prepared documents, which were said to contain the breakdown of the Association's revenues and expenditures. He testified that this statement listed all the Association's receipts and expenses. In response to a question from counsel for the Teamsters, he admitted that there was no trace of the cheque issued by the employer. In the ensuing days, however, he had transferred this sum of money to a Ms. Desorcy. He explained that Ms. Desorcy is in fact a secretarial service used by the Association, according to certain invoices entered in the record. These exhibits also indicated that travel expenses were also billed to the Association by this business. However, evidence produced later revealed that this Ms. Desorcy, the daughter-in-law of the Association's union representative, Mr. Roland Vallée, is, by Mr. Vallée's own admission, a front for him.

As we stated earlier, in the case of Mr. Beauregard's dismissal, a settlement was reached that paid him \$1500 in return for his resignation. The evidence thus revealed

that, in return for this resignation, the employer also agreed to pay the "expenses" associated with Mr. Beauregard's case. These expenses which the employer paid to settle the Beauregard case totalled \$5000, three times the amount paid to Mr. Beauregard.

It was not possible at the hearing to obtain any details on the breakdown of these expenses. The employer presented a bill from the Association, explaining that it was for "expenses" incurred in the Beauregard case. Legal fees are listed in this bill. When asked whether these sums were also to be used to pay the Association's counsel in the present case, Mr. Vallée essentially replied that no payment had thus far been made directly from the amounts received, but payments could be made later. In fact, he said, under the terms of the agreement between Mr. Bousquet and the Association, Mr. Bousquet would be paid only after the union had obtained certification. Mr. Bousquet then volunteered that he was not counsel for the union when the Beauregard case came about and had only recently become counsel of record. He added that, in his opinion, there was no reason to take offence if his fees were eventually paid by the employer. If the employer later agreed to pay his fees, in his opinion this was perfectly acceptable.

When questioned by the Board, Mr. Desjardins, the union treasurer, admitted at the very end of his testimony that, if the deposit slip for the \$5000 cheque from V.A. had disappeared, it was not by accident; it was at the request of the representative Vallée. According to Mr. Desjardins, Mr. Vallée explained to him that it was better to get rid of these documents in order to avoid problems with the Board. In his testimony, Mr. Vallée denied that this conversation took place. In his opinion, Mr. Desjardins was confused. Mr. Vallée claimed that he repeatedly told him, but not in reference to this cheque, that it was better not to keep certain documents to avoid problems with the Board. According to Mr. Vallée, the sum of nearly \$5000 covered primarily the services he provided to the Association in settling the Beauregard case. He described

his services as including both the study of the file and the negotiation of the final settlement.

Counsel for the Teamsters questioned at length Mr. Viateur Audet, president and general manager of V.A., concerning his relations, and in particular his financial relations, with the Association and with Mr. Vallée. Mr. Audet was questioned concerning the terms of the settlement in the Beauregard case. He said very little in this regard, mentioning only the settlement of \$1500. When questioned by counsel for the Association, he did not even mention the payment of fees. Only when questioned by his own counsel did he acknowledge, *in extremis*, the existence of this other cheque of nearly \$5000 made payable to the Association.

Mr. Audet also admitted that all negotiations that resulted in the settlement of a host of grievances that Mr. Beauregard had filed against his employer, as well as the complaint he had filed with the Board, had been handled exclusively by Mr. Vallée, and not by a representative of the Teamsters, even though they were still the certified bargaining agent. Mr. Audet made no mention of any lawyer being involved in the settlement.

Mr. Fleurant currently heads the Association. In the past, he had had a number of quarrels with both his employer and the Teamsters. For example, early in the summer of 1993, the employer consulted his employees individually to discuss wages. Mr. Routhier, who at the time was the Teamsters union steward at V.A., attended all these meetings. The purpose of these consultations was to persuade the employees, in small groups, to forego the pay increase that was due to them under their collective agreement. Mr. Audet, president of V.A., accompanied by Mr. Routhier, union steward, met with three or four employees at a time. Mr. Audet explained the company's problems to them and, in short, asked them to sign a petition calling for the cancellation of the pay increase. At the end of each meeting, the employer withdrew and the employees present were asked to decide whether or not they were

in favour of signing the petition prepared by the employer. This campaign, ostensibly "tolerated" by the Teamsters, angered Mr. Fleurant who at the time was the assistant steward for the Teamsters. He was opposed to this process which he considered underhanded. He complained to the Teamsters' executive. Mr. Charruau, local president, agreed with him and decided to hold a membership meeting. Subsequently, the membership, by secret ballot, overwhelmingly rejected the petition, that is, the very same petition that the vast majority of the members had signed.

The employees were dissatisfied with the services they received from the Teamsters. This, they claim, is the reason why the local officers decided to form their own association, with the technical assistance of Mr. Vallée. Moreover, when the open period began, they took the necessary steps to adopt a constitution and by-laws and to recruit members. The majority of employees signed membership applications. During this time, however, Messrs. Routhier and Fleurant kept their positions as steward and assistant steward in the Teamsters.

At same time, one of the officers of the Association was also in charge of a recreational association for V.A. employees. Both employees and managers belonged to this association. This at least is what we can conclude from the testimony of Ms. Sonia Gauthier, head of human resources for V.A. Ms. Gauthier admitted that she herself had always contributed to this association which was, however, inactive.

In circumstances that were not explained to the Board, the principal officer of the recreational association decided to disband it and to refund members' contributions. A petition was then circulated among the union members who belonged to the association, and each agreed to transfer the amount of his or her refund which amounted to approximately \$70, to the Teamsters' rival. As a result, the Association received about \$2000. Other than an initial contribution of \$5 per person, the Association has not received any further contributions from its members because they continue to pay dues to the Teamsters under the terms of the collective agreement. In

short, since it was established, the Association's revenues have consisted of approximately \$300 in contributions, some \$2000 transferred to it by the defunct recreational association, and approximately \$5000 received from the employer as part of the settlement under which Mr. Beauregard resigned. (Mr. Beauregard, who resigned from V.A., nevertheless attended all Board hearings without, however, having been subpoenaed by any of the parties. He eventually testified at the request of counsel for the Association.)

With regard to the employees' change of union allegiance, Mr. Beauregard testified that, by May or June 1993, the employees' intentions were public knowledge. Even the head of personnel, Ms. Gauthier, asked him whether the rumours in this regard were true.

Mr. Fleurant has been vice-president of the Association since its establishment. He has kept this title even though the Association no longer has a president. Therefore, because of circumstances, he has become the principal officer among the employees. It is, however, Mr. Vallée who determines strategy. He has long been active in union affairs. As a former full-time staff member of the Teamsters, he appears to have developed good relations with V.A. employees and with the employer. Mr. Fleurant on the other hand had serious differences with his former union. In particular, he feels that he was unjustly dismissed from his duties as assistant steward for the Teamsters in September 1993. Given the role that he played in the raiding campaign, he feared that the Teamsters would not represent him fairly. Therefore, as a precaution, he filed a complaint with the Board against the Teamsters under section 37 of the Code in the fall of 1993. Following initiatives by the Board's investigating officer assigned to his case, and after receiving the assurance that the Teamsters had referred all his grievances to arbitration, he has since withdrawn his complaint.

Counsel for the Teamsters requested that the minutes of the Association's meetings be produced at the hearing. These minutes show that the new members of the union

signed membership applications. However, they were not formally admitted to the Association. The minutes also show that the Association's officers who signed the application for certification filed with the Board were not formally authorized by resolution to sign it.

III

Arguments

Counsel for the Teamsters presented two principal arguments against the application. The first is based on section 25(1) of the Code and the second on the provisions of the Regulations dealing with certification formalities. Mr. Blanchard clearly indicated that the second argument is subsidiary to the first. Mr. Blanchard also asked the Board, should it not find the Association dominated or unlawfully influenced by the employer and should it determine that its Certification application was filed in accordance with the Regulations, to order a representation vote.

Mr. Blanchard reviewed both the Quebec and federal case law on the question of domination or influence. He drew attention in particular to the decision of the full Board in Royal Oak Mines Inc. (1993), 92 di 153; and 93 CLLC 16,063 (CLRB no. 1028), and the subsequent decision the Board rendered in the same case, Royal Oak Mines Inc. (1993), as yet unreported CLRB decision no. 1035. In addition, Mr. Blanchard reiterated the test applied by the Board in Transport de l'Est Inc. (1993), 90 di 214 (CLRB no. 987), and the Board decision in CJRC Radio Capitale Ltée (1977), 21 di 416; [1977] 2 Can LRBR 578; and 78 CLLC 16,124 (CLRB no. 89). He cited the five criteria traditionally accepted in Quebec case law as evidence of an association dominated or unlawfully influenced by the employer. According to counsel, these five criteria were present in the instant case.

For his part, counsel for the Association reminded the Board that he was not counsel of record at the outset of these proceedings and that, in his opinion, were it not for the incident involving the \$5000 cheque, there would be precious little evidence for the Board to consider on the question of domination or influence. Mr. Bousquet reviewed the evidence and rebutted the allegations of domination made by opposing counsel as being unfounded. Mr. Bousquet also dismissed as unfounded the allegation that the Association neglected to observe certain formalities.

Counsel for the employer argued that his client had decided to remain neutral and that, in his opinion there was no evidence that it had committed any unlawful act.

IV

Analysis

The Board must decide whether, in the instant case, the Association is entitled to certification. Although Mr. Blanchard raised the question of formalities subsidiarily, the Board deems it appropriate to dispose of this issue. In fact, if no application had validly been presented to the Board, it would be pointless to deal with the question of domination.

1. The Formalities of the Application

The two principal arguments raised by Mr. Blanchard in this regard concern the signing of the application and the validity of the memberships.

The Regulations stipulate that an application like the present one must be signed by its authorized officers. According to the evidence heard, the signatories, at the time that the application was filed, were its principal officers. The fact that the minutes do not explicitly refer to the authorization to sign and present the application does not

invalidate the said application in the present case. The evidence established conclusively that all steps were taken to this end. The minutes clearly reveal that the signatories were authorized to file this application on behalf of the Association. Therefore, on this question, the Teamsters' first argument does not appear to be valid and is rejected.

We now turn to the argument concerning memberships. It is alleged that the Association did not formally "admit" to its ranks those persons who had signed membership applications. That is true. This, however, is precisely the type of case covered by section 24(a) of the Regulations. This section specifies that a simple application for membership in a trade union can take the place of membership per se for the purposes of determining the representative character. Thus, failing to hold an admission meeting cannot invalidate the wishes of those who signed membership applications. Given the clear wording of the Regulations, the Board also dismisses this second argument.

2. The Question of Employer Domination

Since application for certification has been properly filed by the Association, the Board must decide whether this association is dominated or unlawfully influenced within the meaning of section 25(2) of the Code.

Parliament prohibited the certification of a trade union that is dominated or unlawfully influenced. Very recently, a plenary session of the Board rendered a unanimous decision concerning employer domination or influence (see Royal Oak Mines Inc. (1028), supra). Little purpose would be served by repeating the facts of that case. Essentially, the Board held that a trade union that is seeking certification must be free from any employer influence in all respects. Moreover, section 94(1)(a) of the Code contains a formal prohibition: no employer shall interfere in the affairs of a trade union or contribute financially to it.

The evidence produced persuaded the Board that the Association does not possess the degree of autonomy and freedom vis-à-vis the employer that is required by the Code for certification by the Board. In fact, the evidence clearly showed that where financial matters are concerned, the Association was not at arm's length from the employer.

Contrary to claims made by the Association's counsel, the incident involving the cheque is not the only evidence. Two aspects of the so-called payment made to the Association are disturbing in terms of the union's independence. First, the union's secretary-treasurer made sure that no trace of this cheque remained, and the Association tried to conceal the truth in this regard. Only when questioned by the Board did the secretary-treasurer admit, at the very end of his testimony, that he knowingly disposed of all evidence of the cheque at the suggestion of union representative Vallée. Mr. Vallée denied giving this order, but provided no explanation whatsoever of the advice he apparently gave repeatedly to union representatives to dispose of documents in order to avoid problems during proceedings before the Board. It was never explained what problems were anticipated or why. The Board does not believe Mr. Vallée's testimony on this question.

As for payment by the employer of nearly \$5000 for fees, not even a superficial explanation was provided. Reference was made to legal fees. In his testimony, Mr. Vallée stated that, under his agreements with his counsel, the latter will not receive any payment, in his words, "until the union has its certification." In the same breath, however, he stated that part of the \$5000 he received from the employer will be paid to counsel retained to act in the certification proceedings. When questioned regarding what he knew about this sizable sum of \$5000 that he agreed to pay, the president of V.A. stated that he knew nothing of the matter, only that a bill had been submitted by the Association. However, the evidence shows that, barely a few months earlier, he had tried to reduce the wages of his employees because the company was in financial difficulty. The evidence does not explain how a company in financial

difficulty could have agreed so readily to pay this amount in fees. This is particularly difficult to understand given that the cumulative total of the services that Mr. Vallée rendered to the company is approximately one hour.

Moreover, no explanation was provided as to why Mr. Vallée used his daughter-in-law as a front. He testified that he did so for tax purposes. He gave the same explanation for the fact that V.A. paid the money to the Association, rather than directly to him. The Board wishes to underline that, during the presentation of arguments, counsel for the Association stated that he did not find at all questionable the fact that the employer would eventually be paying his legal fees for the certification proceedings!

The explanations given simply do not withstand scrutiny. Consider first the taxation argument. The invoices submitted in the daughter-in-law's name do not include any billing for tax purposes. If the objective was to avoid paying taxes, this was a very inept way of doing so. This was not the objective. Clearly the objective was to mislead the Board and unquestionably V.A. employees too.

The argument that the fees were paid by the company to settle the Beauregard case is gross. Mr. Beauregard resigned and abandoned all recourse in return for payment of \$1500. It is claimed that the fees in connection with this settlement were nearly \$5000. This amount was kept secret for as long as possible. In fact, it was not revealed until counsel for Mr. Audet was satisfied that his client - in his best interests - would reveal the circumstances of its payment. The Association's treasurer revealed, almost inadvertently, that he lost track of or conveniently destroyed any evidence of this payment. The Board simply does not believe the testimony of the Association's witnesses on this matter, any more than it believes Mr. Audet's testimony that he blindly went ahead and paid a very expensive bill without asking any questions.

The rejection of the June initiative to reduce wages, the hesitancy and secretiveness of the Association, the funds transferred to a front, Mr. Vallée's animosity towards the Teamsters: taken together all indicate that V.A. wanted an "Association" and that the leaders of the Association received financial assistance from V.A. to establish this association. As the Board stated in Royal Oak Mines Inc. (1028), *supra*:

"... In cases of allegations of employer domination or influence under section 25 or 94, the Board needs to rely on circumstantial evidence since direct evidence is rarely available:

'... Similarly, since a trade union that is dominated or influenced by an employer is liable to be refused certification, unions are unlikely to disclose readily any ties they may have with employers. ...' (CJRC Radio Capitale Ltée, supra, pages 432; 591; and 360)

'... we do not expect to receive direct evidence that the employer has dominated, influenced or initiated the establishment of a Union, or that the dismissal is related to an employee's union activity. In such cases, we must base our decision on our assessment of the circumstantial evidence which is submitted to us. ...' (Cabano Transport Ltd. (1981), 42 di 318 (CLRB no. 294), pages 333-334)"

(pages 163; and 14,508)

In addition to the facts related above, it must be remembered that the employer did not hesitate to negotiate the settlement of Mr. Beauregard's grievances with Mr. Vallée, the Association's jack-of-all-trades, even though the Association had no status whatsoever as a bargaining agent. In doing so, the employer sent its employees a clear message: with the Association, problems are settled. This action clearly contravened the spirit of section 94(3)(g):

"94.(3) No employer or person acting on behalf of an employer shall

...

(g) bargain collectively for the purpose of entering into a collective agreement or enter into a collective agreement with a trade union in respect of a bargaining unit, if another trade union is the bargaining agent for that bargaining unit."

This action constitutes, in itself, a form of direct employer interference in the representation of employees by the Teamsters (see section 94(1) of the Code).

The system of free collective bargaining requires that unions be independent of employers, i.e., independently administered, managed and financed. Employer influence and domination are often established through various circumstances. In the instant case, the circumstances are rather disturbing.

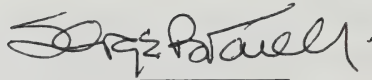
Based on the oral evidence, there is no doubt in the Board's mind that the Association is a dominated association that is unlawfully influenced by the employer and that V.A. employees would not be represented in accordance with the Code were the Board to certify the Association.

V

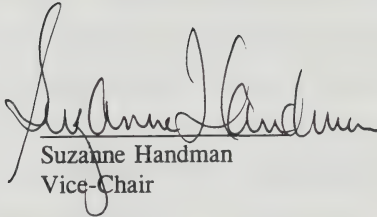
Conclusion

In the light of the foregoing, the Board, acting pursuant to section 25(1) of the Code, dismisses the Association's application for certification. Accordingly, the Teamsters shall remain the bargaining agent for the employees until they are displaced in accordance with the Code.

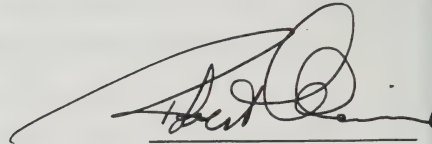
The Board noted, however, that relations between the Teamsters and its local at V.A. were seriously strained. The Teamsters officers should do what is necessary to reassure their members and regain, if possible, their support.



Serge Brault
Vice-Chair



Suzanne Handman
Vice-Chair



Robert Cadieux
Member

information

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Summary

Brotherhood of Maintenance of Way Employees, *applicant*, and Canadian National Railway Company and Cape Breton and Central Nova Scotia Railway Limited (CB&CNS), *respondents*, and Attorney General for the Province of Nova Scotia, *intervenor*.

Board File: 585-521

CLRB Decision no. 1078
August 5, 1994



This is an application for a declaration of sale of business pursuant to section 44 of the Code following the sale of the Truro-Sydney line from CN to the CB&CNS.

The issue is whether the alleged purchaser CB&CNS is a federal undertaking and comes under federal jurisdiction.

The Board determined that the operations of the purchaser CB&CNS are not an integral part of CN, a core federal undertaking.

The application was dismissed since the Board lacks jurisdiction to deal with the application. It is necessary for both the seller and the purchaser to come under federal jurisdiction for such a declaration to be made.

Résumé

Fraternité des préposés à l'entretien des voies, *requérante*, et Compagnie des chemins de fer nationaux du Canada et Cape Breton and Central Nova Scotia Railway Limited (CB&CNS), *intimés*, et Procureur général de la province de Nouvelle-Écosse, *intervenant*.

Dossier du Conseil: 585-521

CCRT Décision n° 1078
le 5 août 1994

Il s'agit d'une demande en vue d'obtenir une déclaration de vente d'entreprise fondée sur l'article 44 du Code à la suite de la vente de la ligne Truro-Sydney de CN à CB&CNS.

La question est de déterminer si le présumé acheteur, CB&CNS, est une entreprise fédérale et relève de la compétence fédérale.

Le Conseil juge que l'exploitation de l'acheteur, CB&CNS, n'est pas partie intégrante de CN, une entreprise principale fédérale.

La demande est rejetée puisque le Conseil n'a pas compétence pour traiter la demande. Pour qu'une telle déclaration soit faite, il faut que le vendeur et l'acheteur relèvent tous deux de la compétence fédérale.

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Reasons for decision

Brotherhood of Maintenance of Way
Employees,

applicant,

and

Canadian National Railway Company and Cape
Breton and Central Nova Scotia Railway
Limited,

respondents,

and

Attorney General for the Province of Nova
Scotia,

intervenor.

Board File: 585-521

Decision no. 1078

August 5, 1994

The Board was composed of Mr. J. Philippe Morneau, Vice-Chair, and
Messrs. Calvin B. Davis and Patrick Shafer, Members.

Appearances

Messrs. Georges Marceau and David Brown, accompanied by Mr. Gary Housch,
Vice-President, Brotherhood of Maintenance of Way Employees, for the applicant;
Messrs. John Coleman and Serge Cantin, Q.C., for Canadian National Railway
Company;

Messrs. Bruce MacIntosh and Harry Munro, accompanied by Mr. Mark Westerfield,
General Manager, Cape Breton and Central Nova Scotia Railway Limited, for Cape
Breton and Central Nova Scotia Railway Limited; and
Mr. William Lahey, for the intervenor.

These reasons for decision were written by Mr. J. Philippe Morneau, Vice-Chairman.

I

The Board has before it an application filed by the Brotherhood of Maintenance of Way Employees (BMWE or the applicant), pursuant to section 44 of the Canada Labour Code (Part I - Industrial Relations), seeking a declaration that a sale of business had occurred between Canadian National Railway Company (CN) and Cape Breton and Central Nova Scotia Railway Limited (CB&CNS).

It is well established that the Board has jurisdiction to declare that a sale of business has taken place pursuant to section 44 only where both the seller and the purchaser of the business fall within federal jurisdiction. (See G and J Cartage (1987), 70 di 210 (CLRB no. 644); Canadian Broadcasting Corp. and Ciné Le Matou Inc. (1987), 71 di 12 (CLRB no. 646); Byers Transport Ltd. (1988), 75 di 164 (CLRB no. 715); Burns International Security Services Ltd and Canada Post Corp. (1989), 78 di 39; and 3 CLRBR (2d) 264 (CLRB no. 746); Servall Transport Limited et al. (1991), 86 di 185; and 16 CLRBR (2d) 303 (CLRB no. 908).) For this reason, the Board decided to hold a hearing strictly to determine the constitutional question of whether CB&CNS is a federal undertaking within the meaning of section 2 of the Canada Labour Code.

A hearing was held in Halifax on January 18 and 19 and on March 8, 9, 10 and 30, 1994. As a result of preliminary motions made at the outset of the hearing on January 18 and 19, the Board ordered that a notice of a constitutional question pursuant to section 57 of the Federal Court Act, R.S.C. 1975, c. F-7, be sent to all attorneys general because of section 52(1) of the Railways Act, S.N.S. 1993, c. 11, which came into force on October 1, 1993 and which provides specifically for application to CB&CNS:

"52. (1) The agreement dated the thirtieth day of September, 1993, between Her Majesty in right of the Province, represented by the Minister, and the Cape Breton & Central Nova Scotia Railway Limited is deemed to be a licence issued pursuant to this Act and, for greater certainty, is subject to the Act and regulations."

As a result, the Attorney General for Nova Scotia intervened in the proceedings before the Board and participated in the hearings on March 8, 9, 10 and 30, 1994. All other attorneys general declined the invitation.

II

The facts that gave rise to this application can be summarized as follows. CB&CNS is a railway company which was provincially incorporated on September 3, 1992 and which is wholly owned by Railtex Inc., an American company. On September 18, 1992, CB&CNS acquired, by virtue of an Asset Purchase Agreement entered into with CN, a railway line wholly situated in the province of Nova Scotia, which was known as the "Truro-Sydney line."

The Truro-Sydney line consists of an operating right-of-way between Truro and Sydney comprising 113.98 miles of the Hopewell Subdivision between Truro and Havre Boucher, 113.90 miles of the Sydney Subdivision between Havre Boucher and Sydney and 8 miles of the Oxford Subdivision between Stellarton and the end of the rail (for a total of 235.88 miles). The line connects with CN railway at Truro. From the Sydney yard, goods have to be put on ships if they are to be sent to Newfoundland.

The Truro-Sydney line falls within the definition of a short-line railway as described by Mr. Robert L. Banks, an expert witness who testified before the Board. A short-line is a railway owned by a corporate entity completely unaffiliated with a Class 1

railway, such as CN or Canadian Pacific.

On July 27, 1993, the National Transportation Agency (NTA) approved the conveyance by CN of the Truro-Sydney line to CB&CNS in accordance with the National Transportation Act.

Pursuant to the terms of the Asset Purchase Agreement, CB&CNS bought the lands, buildings, stations, tracks, railway rails, and track machinery located on the Truro-Sydney line and has undertaken to maintain and operate the short-line as a freight railway line, providing services to existing and future rail users in accordance with rail common carrier standards.

CB&CNS purchased eight and leased five locomotives from CN. The leased locomotives were to be returned to CN at the end of March 1994. CB&CNS intended to purchase twelve other locomotives in April 1994 from whichever company was offering the best price and quality.

CB&CNS received no financial assistance from CN in order to acquire the railway line or to support its activities. There are 46 employees working at CB&CNS, the majority being former CN employees.

Moreover, CB&CNS and CN have entered into an Operating and Marketing Agreement as part of the Asset Purchase Agreement which provides that CB&CNS will receive a carload rate for the interchanged traffic based on a schedule agreed to by CB&CNS and CN. The Operating and Marketing Agreement is also aimed at maintaining the Truro-Sydney line to standards, ensuring the safe operation of equipment, and provides for the co-ordination of transit times, schedules and maintenance procedures.

An Interchange Agreement has also been concluded between CB&CNS and CN as part

of the Asset Purchase Agreement providing for the availability of certain yard trackage at Truro for the interchange of traffic (the Truro "D" Yard). A portion of this yard is owned by CB&CNS and the rest by CN. There is no locked derail device in place at the Truro "D" Yard for line connection. Switches interconnecting CB&CNS tracks with CN tracks (called "interface switches") permit interchange traffic between the short-line and CN. A computer signal system, said to be more effective than a lock-out device, has been installed to detect locomotives coming through the CB&CNS line. Other than the overlapping of traffic at Truro, CN is not allowed to circulate elsewhere on CB&CNS lines and vice versa.

CB&CNS employees conduct the inspection on cars left by CN on the track in the Truro "D" Yard, an inspection formally called the initial terminal test. In the same manner, the inspection on cars coming from the short-line has to be done by CN employees. There is however no interaction between CN crews and CB&CNS crews. Employees of CB&CNS communicate with each other through a radio system linked to the central controls in Port Hawkesbury and through cellular phones, whereas CN has a different radio communication system not connected to CB&CNS.

The nature of the traffic on the Truro-Sydney line consists of various products: coal, steel, paper, cars, oatmeals, tires and others. CB&CNS's main intra-line customers are Devco, Stora Paper, Scott Paper, Sydney Steel, Michelin Tire and Sears Warehouse. The intra-line traffic (traffic which originates and terminates on CB&CNS lines) represented 56.1% of the total traffic on the short-line in 1992. The following figures constitute a comparison between intra-line and inter-line traffic at the short-line (carloads and percentages) for previous years:

<u>Year</u>	<u>Intra Carloads</u>	<u>Total Carloads</u>	<u>Intra as Percent of Total</u>
1990	12 832	22 169	57.9%
1991	13 233	22 582	58.6%
1992	12 885	22 948	56.1%

CN and CB&CNS have agreed to co-ordinate their marketing efforts to maximize the revenue generated from the short-line to their mutual benefit. By deciding not to abandon the line, CN still offers its clients the opportunity to make use of CB&CNS service on the short-line. CB&CNS has agreed to co-ordinate its schedule for the meeting of trains at Truro. CN continues to quote freight rates and collect for its own accounts all revenues for traffic handled to and from locations on the Truro-Sydney line which represents the rest of the traffic on the line.

As mentioned above, CN pays CB&CNS a carload rate based on an agreed upon schedule for inter-line traffic in accordance with the billing practice in the railway industry. Where goods are routed through numerous companies, the billing practice is to have one company prepare the invoice for a particular destination and distribute thereafter the revenues among the other companies involved. An interchange report is sent to the other party every month detailing the content of cars, schedules and the per car rate. CB&CNS has to pay an hourly rate for cars other than its own travelling on the short-line.

Before the acquisition in 1992, CN carloads for the Truro-Sydney line represented 1.5% (25 000/1 630 000) of its total carloads. Similarly, CN's gross ton miles for the Truro-Sydney line represented 0.3% of CN's total gross ton miles.

CB&CNS's principal competitive modes of transportation are transportation by trucks and vessels. CN has maintained its intermodal activities with the trucking industry for the Truro-Sydney line and, in that regard, constitutes CB&CNS's major intermodal competitor.

Maintenance of CB&CNS rolling stock is done at its repair shop in Sydney for almost all running repairs. When maintenance is done elsewhere, the rolling stock is sent to

the repair shop that offers the most competitive price and, consequently, not necessarily to CN.

All these facts tend to demonstrate an arm's length relationship between CN and CB&CNS. However, in the event that CB&CNS decides to abandon or sell the short-line, the Asset Purchase Agreement provides that CN holds the right of first refusal to reacquire the line.

At the time of the acquisition of the railway line, there was no up-to-date provincial railway legislation. Assuming that it comes under provincial jurisdiction, CB&CNS undertook, by an agreement dated October 1, 1993 (Exhibit 39-4), to comply voluntarily with the existing federal legislation governing railroad operations until the provincial legislature of Nova Scotia passed the above-mentioned Railways Act.

III

The applicant submits that CB&CNS is an integral or essential part of a core federal undertaking, CN. It bases this submission on all features that it finds in the evidence that distinguish the present situation from the case in United Transportation Union v. Central Western Railway Corp., [1990] 3 S.C.R. 1112; (1990), 76 D.L.R. (4th) 1; and 91 CLLC 14,006, and also on the elements in the agreements between CN and CB&CNS that it says show that CN has control over CB&CNS operations.

The applicant also submits that the effective performance of CN's obligation as a national railway is dependent or contingent upon the services provided by CB&CNS.

CB&CNS submits that it is in no way functionally integrated with CN, that whatever agreements were signed and whatever operational arrangements were made to co-ordinate activities are simply standard arrangements in the railway industry with the

generally sought objective of providing "seamless" service. It submits that in no way is CN dependent on CB&CNS's services since CN is involved in intermodal transport and can easily use trucking as an alternate means of transportation. Furthermore, it submits that CN's traffic on the Truro-Sydney line is such a small part of CN's overall business that CN could simply abandon it and not be severely disadvantaged.

For these reasons, CB&CNS submits that it is a provincial undertaking not subject to the Canada Labour Code.

CN submits that the NTA decided on July 27, 1993 that CB&CNS is not subject to the National Transportation Act and therefore that it is not a federal undertaking. It cautions the Board to be circumspect in finding that CB&CNS is a federal undertaking, and suggests that if the Board does so, it should refer its decision to the Federal Court of Appeal as there will then be conflicting decisions of two federal agencies on the same issue.

CN also submits that co-ordination between transportation agencies is not integration and relies on Ferguson Bus Lines Ltd. v. Amalgamated Transit Union, Local 1374, [1990] 2 F.C. 586; (1990), 68 D.L.R. (4th) 699; and 90 CLLC 14,015 (C.A.). It submits that in no sense can CN be said to be dependent on CB&CNS nor that CB&CNS is an essential link to Newfoundland. CN relies on the decision in Central Western Railway, supra, and submits that CB&CNS is a provincial undertaking.

The Attorney General for the Province of Nova Scotia generally accepts the respondents' submissions and submits that CB&CNS falls within provincial jurisdiction and operates a provincial rail line. Nova Scotia has made the necessary regulatory arrangements and enacted new railway legislation, the focus of which is CB&CNS.

IV

A transportation business can be found to fall within federal jurisdiction for any of the three following reasons:

- (1) it could be found to be an interprovincial undertaking by itself and come under section 92(10)(a) of the Constitution Act, 1867;
- (2) it could be found to fall within federal jurisdiction by virtue of a Parliament's declaration made in accordance with section 92(10)(c);
- (3) it could be an integral part of a core federal work or undertaking.

Section 92(10) of the Constitution Act, 1867 reads as follows:

"92. In each Province the Legislature may exclusively make Laws in relations to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,

...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

Section 2 of the Code states to the same effect:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

...

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces; ..."

and section 4 of the Code establishes the Board's constitutional jurisdiction:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

As a matter of principle, railways, like any transportation business, come under provincial jurisdiction:

"The essential scheme of s. 91(10) is to divide legislative authority over transportation and communication on a territorial basis. The

specific references in s. 92(10)(a) to 'lines of steam or other ships, railways, canals, telegraphs' do not allocate those modes of transportation or communication unqualifiedly to the federal Parliament. The references must be read in the context of the later reference to 'other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province', and the whole of paragraph (a) must be read as an exception to the grant of provincial authority over local works and undertakings. The effect is to allocate to the federal Parliament the authority over interprovincial or international shipping lines, railways, canals, telegraphs and other modes of transportation or communication; and to allocate to the provincial Legislatures the authority over intraprovincial shipping lines, railways, canals, telegraphs and other modes of transportation or communication."

(Hogg, P.W., Constitutional Law of Canada, 3rd ed., Vol. 1 (Scarborough: Carswell, 1992), pages 22-2, 22-3)

This statement is consistent with the well-known premise that labour relations come under provincial jurisdiction unless they are found to be an integral part of a federal subject under the Constitution (Construction Montcalm Inc. v. Minimum Wage Commission et al., [1979] 1 S.C.R. 754; and (1979), 93 D.L.R. (3d) 641, at pages 768; and 652, and Re Eastern Canada Stevedoring Company Limited, [1955] S.C.R. 529; and [1955] 3 D.L.R. 721).

In this case, it has not been argued before the Board that CB&CNS is, by itself, an interprovincial railway within the meaning of section 92(10)(a). In any event, it has been clearly established that the simple physical connection of the short-line to an interprovincial railway is not sufficient to conclude that it comes under section 92(10)(a) (British Columbia Electric Ry. Co. v. Canadian National Ry. Co., [1932] S.C.R. 161, and Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225; and (1989), 98 N.R. 161, at pages 262; and 198). In Central Western Railway, *supra*, the Supreme Court of Canada ruled:

"... Railways, by their nature, form a network across provincial and national boundaries. As a consequence, purely local railways may very well 'touch, either directly or indirectly, upon a federally regulated work or undertaking. That fact alone, however, cannot reasonably be sufficient to turn the local railway into an interprovincial work or undertaking within the meaning of s. 92(10)(a) of the Constitution Act, 1867. Furthermore, if the physical connection between the rail lines were a sufficient basis for federal jurisdiction, it would be difficult to envision a rail line that could be provincial in nature: most rail lines located within a province do connect eventually with interprovincial lines."

(pages 1129; 11; and 12,045; emphasis added)

Also, there exists no declaration from Parliament that CB&CNS is a work for the general advantage of Canada. Rather, it is specifically provided to the contrary in the Railway Act, R.S.C. 1985, c. R-3, that:

"6.(3) When a line of railway or portion thereof is conveyed to a company incorporated by or under an Act of the legislature of a province, any declaration by this or any other Act of Parliament that the railway is a work for the general advantage of Canada or for the advantage of two or more provinces thereupon ceases to have effect with respect to the line or portion thereof."

Therefore, the only constitutional issue left to be determined is whether CB&CNS is an integral part of CN, an identifiable core federal undertaking engaged in interprovincial transportation.

The applicable test to determine whether a subsidiary operation forms an integral part of a core federal undertaking has been set out in Northern Telecom Limited v. Communication Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211 (Northern Telecom no. 1):

"(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial

competence is the rule.

(2) *By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.*

(3) *Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.*

(4) *Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.*

(5) *The question whether an undertaking, service or business is a federal one depends on the nature of its operation.*

(6) *In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.*

A recent decision of the British Columbia Labour Relations Board, Arrow Transfer Co. Ltd., provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as 'vital', 'essential' or 'integral'. As the Chairman of the Board phrased it, at pp. 34-5:

In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment

relationship."

(pages 132-133; 13-14; and 143; emphasis added)

Of course, a careful assessment of the facts of each particular case has to be made in light of these guidelines. In making this determination, the Board examines such factors as the following:

"On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of 'constitutional facts', facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:

(1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;

(2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;

(3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;

(4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system."

(Northern Telecom no. 1, supra, pages 135; 15-16; and 144)

Most importantly in this context, the question to ask here is whether the effective performance of CN's obligation as a national railway is contingent upon CB&CNS's services (Central Western Railway, supra).

The nature of CB&CNS's operation is to provide railway transportation within a portion of the province of Nova Scotia. Its role in relation to CN is limited to

providing CN's clients with the same service it provides to its own clients for intra-line traffic. As was the case in Central Western Railway, *supra*, there is no simultaneous connection between CN and CB&CNS; there is only a transfer at the end of the line for inter-line traffic. CN does not control CB&CNS in any way; CB&CNS is responsible for managing and operating the short-line. The Operating and Marketing Agreement has been entered into in order to provide for the co-ordination of marketing inter-line traffic services and for the distribution of revenue for inter-line traffic, and does not permit CN in any way to control or direct the activities of CB&CNS. CN and CB&CNS each operate independently within their own boundaries.

There is no corporate relationship whatsoever between CN and CB&CNS; the latter is a wholly owned subsidiary of Railtex Inc. Unlike the Central Western Railway case where the purchase price was advanced by CN as an interest free loan, CN did not provide any form of financial assistance to CB&CNS for acquiring the line. Moreover, the two railway companies are competitors on the Truro-Sydney line as CN offers its customers the transportation of goods by the intermodal trucking system.

CN's right of first refusal in the agreement, it was argued, demonstrates CN's need to have the operation of the Truro-Sydney line continued for the effective performance of its obligations. However, it appears from the evidence (Exhibit 1(f)) that CN's commitment to continue the operations of the short-line in case of abandonment or sale of the line by CB&CNS has been undertaken as a condition for provincial government's approval of the sale rather than because of CN's interest in the line. Nevertheless, this is not enough to conclude that CN depends upon the operations of the short-line.

As to the importance of the work done by CB&CNS employees for CN, we can only say that there is no work done by CB&CNS employees under CN's direction, only work done for it as a customer. Although approximately 50% of CB&CNS's traffic is inter-line, the work carried out by CB&CNS employees in that context is to service

CN's customers or other customers whose goods may very well come from or be destined for elsewhere (for example the United States of America). The billing process used in the railway industry, where one company is responsible for the invoice and distributes the revenue in accordance with services provided by other railway companies, makes it sometimes difficult to conclude that a particular customer is more one company's customer than another's. In any event, CB&CNS employees are not involved in CN activities as an interprovincial railway but rather provide intraprovincial railway services for customers who want their goods to reach a certain point in or out of Nova Scotia. As mentioned earlier, there is no exchange or simultaneous connection between CN employees and CB&CNS employees. Both groups work independently in their own sphere.

Finally, the operational connection between CN and CB&CNS constitutes the most important factor in assessing the constitutional facts. As the Supreme Court of Canada stated in Northern Telecom Canada Limited et al. v. Communication Workers of Canada et al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC 14,048 (Northern Telecom no. 2):

"This factor is obviously the most critical in determining whether the federal Parliament or the provincial legislature has constitutional jurisdiction. There is clearly some connection between the Telecom installers and Bell Canada, the core federal undertaking, but is it sufficient to displace the prima facie position that labour relations are a matter of provincial competence?"

(pages 772; 5; and 12,260)

The operational integration that is described in the Supreme Court of Canada decision in Northern Telecom no. 2, supra, at pages 772-774; 5-7; and 12,260-12,261, is absent in this case. We do not find any distinguishing facts that may lead to a different conclusion than the one reached by the Supreme Court of Canada in Central Western Railway, supra. There is no temporal integration or simultaneous transfer of service

between CN and CB&CNS; the only transfer occurs at the end of the short-line.

The operation of the short-line by CB&CNS is completely independent from CN's management of its interprovincial railway. Even saying this, we still do recognize that a close commercial relationship exists between CN and CB&CNS and that co-ordination is needed for both lines to provide efficient services. However, this fact does not necessarily amount to integration. As the Supreme Court of Canada puts it:

"In my view, moreover, this Court's dicta consistently suggests that something more than physical connection and a mutually beneficial commercial relationship with a federal work or undertaking is required for a company to fall under federal jurisdiction."

(Central Western Railway, *supra*, pages 1147; 24; and 12,057)

There is no direct CN participation in the day-to-day activities of CB&CNS. The connection at the Truro "D" Yard is conducted by one of the railway companies, depending on the destination of the car. This usual co-ordination at any transportation business is required by the very nature of the transportation industry. As was explained by the Board in Byers Transport Limited et al. (1986), 65 di 127; and 12 CLRBR (NS) 236 (CLRB no. 571), and cited by the Federal Court of Appeal in Ferguson Bus Lines Ltd., *supra*:

"Coordination among transport companies is not sufficient to make them a single undertaking in the constitutional sense (In re Cannel Freight Cartage Limited, [1976] 1 F.C. 174 (C.A.); Metrans (Western) Inc., supra). Although undertakings in the constitutional sense need not coincide with corporate arrangements (Bernshine Mobile Maintenance Ltd. (1984), 56 di 83; 7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRB no. 465), affirmed by the Federal Court of Appeal, Bernshine Mobile Maintenance Ltd. v. CLRB (1985), 62 N.R. 209; and 85 CLLC 14,060), in the present circumstances, corporate independence, has produced operational independence and the latter is what is of real constitutional significance.

*We do not think anything in this case turns on the percentage of the goods handled by Stern that have an ultimate extraprovincial origin or destination. Rather, what is significant is that Stern, or for that matter R & K, have nothing to do with those goods crossing provincial borders. When one is identifying constitutional undertakings in the transportation industry, one examines the operations of the business, not the itinerary of the persons or goods being transported (Winner et al., *supra*; Cannet Freight Cartage Limited, *supra*; Metrans (Western) Inc., *supra*). If constitutional jurisdiction depended on the itinerary of goods and persons, almost every local transportation enterprise would be federal since there would be bound to be some ultimate extraprovincial origins or destinations. We do not look at the itinerary of the persons or goods because it is not the constitutional basis of their regulation that is at issue - rather it is the constitutional basis of the regulation of the transportation undertaking that is in question.*

This also explains why simple coordination among various transportation undertakings does not transform them into a single undertaking in the constitutional sense. The itineraries of persons and goods are not planned according to the dictates of business organization. To get persons and goods to their intended destination, there must be coordination among various enterprises, but that cannot make the transportation industry one gigantic single constitutional undertaking."

(pages 132-133; emphasis added)

Finally, it is clear that CN does not depend upon CB&CNS to service its clients. Although CN offers to its clients the possibility of using the CB&CNS line to transport goods within the province of Nova Scotia, the important fact is that CN may use and is using other modes of transportation to service its clients on the highway between Truro and Sydney. In any event, the traffic on the Truro-Sydney line before CN sold it to CB&CNS represented only 1.5% of CN's total carloads. For this reason, which was held by the Supreme Court of Canada to be an almost decisive factor (Central Western Railway, *supra*, at pages 1142; 21; and 12,055), it cannot be said that CN "would be severely disadvantaged if CB&CNS employees failed to perform their usual tasks."

Consequently, the Board concludes that the facts of this case do not warrant a conclusion that CB&CNS, the alleged purchaser for the purposes of s. 44, is a federal undertaking by virtue of its relationship with CN. CB&CNS is simply a local undertaking subject to provincial jurisdiction.

Having so concluded, the Board does not have jurisdiction to deal with the instant application. As the Board has many times stated, for example in Byers Transport Ltd. (1988), 75 di 164 (CLRB no. 715):



"For all of the above reasons, we are satisfied that Owl is not a federal work, undertaking or business, and consequently this Board does not have jurisdiction to entertain any complaints or applications with regard to Owl. Accordingly, the unfair labour practice complaints addressed specifically to Owl are dismissed, as is the section 144 application to which Owl is a party, since it is a condition precedent to a successful section 144 application that both parties to the successorship fall within federal jurisdiction.

'business' means any federal work, undertaking or business and any part thereof.

In situations like the instant one, until such a time as there is a reconciliation between federal and provincial legislators to deal with cases of mixed jurisdiction, if both enterprises are not within federal jurisdiction, then this Board can deal no further with the issue."

(pages 179-180)

BMW's application for a declaration of sale of business between CN and CB&CNS is therefore dismissed.


J. Philippe Morneau
Vice-Chair
Calvin B. Davis
Member
Patrick Shafer
Member

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Summary

Terence J. Grams, *employee*, Canadian Pacific Ltd., *employer*, and Transport Canada *interested party*.

Board File: 950-286
CLRB/CCRT Decision no. 1079
August 22, 1994

This case deals with the referral of a safety officer's decision pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

A trainman, assigned to a "through run" of up to 10 hours, invoked his right to refuse to work pursuant to section 128(1) when he noticed that the seat he was to occupy wobbled from side to side. Predisposed to back injuries, he anticipated back problems if he were required to fulfill his tour of duty occupying the seat in its condition.

The Board confirms the safety officer's decision. Following a careful review of the safety officer's investigation and the evidence presented at the hearing, and without considering the employee's predisposition to back discomfort or injury, the Board concludes that danger as defined by the Code did not exist in this situation.

Résumé

Terence J. Grams, *employé*, Canadien Pacifique Ltée, *employeur*, et Transports Canada *partie intéressée*.

Dossier du Conseil: 950-286
CLRB/CCRT Décision n° 1079
le 22 août 1994

Il s'agit du renvoi d'une décision d'un agent de sécurité aux termes du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Un agent de train, affecté à un parcours direct pouvant durer jusqu'à 10 heures, a invoqué son droit de refuser de travailler aux termes du paragraphe 128(1) lorsqu'il a remarqué que le siège qu'il devait occuper était instable. Prédisposé aux blessures au dos, il prévoyait s'en ressentir s'il devait occuper ce siège pour la durée du parcours.

Le Conseil confirme la décision de l'agent de sécurité. À la suite d'un examen approfondi de l'enquête de l'agent et des éléments de preuve présentés à l'audience, et sans tenir compte de la prédisposition de l'employé aux douleurs ou aux blessures au dos, le Conseil juge que les circonstances de la présente affaire ne comportaient aucun danger au sens du Code.



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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Terence J. Grams,

employee,

and

Canadian Pacific Ltd.,

employer,

and

Transport Canada,

interested party.

Board File: 950-286

Decision no. 1079

August 22, 1994

The Board was composed of Mr. Michael Eayrs, Member, as a single member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on July 4, 1994, at Vancouver, B.C.

Appearances

Mr. Walter R. Plomish, assisted by Messrs. James Hurst and Ray Knatiuk, for the employee; and

Mr. Ross Hunt, assisted by Messrs. M.E. (Michael) Keiran and C.W. (Chuck) Gosling, for the employer.

These reasons for decision were written by Mr. Michael Eayrs, Member.

Mr. Terence J. Grams. The request for referral was made in a timely manner and Mr. Walter Plomish, legislative representative of the United Transportation Union (UTU), was duly authorized by Mr. Grams to represent him in this matter. The decision subject to these proceedings was rendered by Mr. Allen E. Bartlett, a safety officer within the meaning of the Code, (hereinafter referred to as the safety officer), following his investigation of Mr. Grams' refusal to work on April 28, 1994 at the Coquitlam Yard of Canadian Pacific Limited (CP Rail).

Section 129(5) of the Code reads as follows:

"129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

II

Mr. Grams, an experienced trainman employed by CP Rail since 1982, has been working on "through" trains since 1986. He told the Board that he had sustained some injuries in 1979 while playing hockey and has been seeing a chiropractor on a regular basis for the past several years. He remains active in sports despite his earlier injury and has not, except perhaps for one occasion, reported medical problems to his employer.

On April 28, 1994, Mr. Grams reported for his assigned tour of duty which involved a "through run" of up to 10 hours' duration. When he entered the cab of the locomotive to which he was assigned, he noted that the seat he was to occupy was

slanted to the right and wobbled from side to side. Mr. Grams immediately reported this to his employer who subsequently sent a shop crew which effected repairs to but did not replace the seat assembly. Mr. Grams remained dissatisfied with the condition of the seat which, he states, continued to wobble from side to side. He again requested that the seat assembly be replaced claiming that due to his previous injury, it was not fit for him to occupy. He anticipated back problems if he were required to fulfill his tour of duty occupying the seat in its present condition.

The assistant general yard master of CP Rail asked Mr. Grams if he intended to "book off sick" to which Mr. Grams replied in the negative. CP Rail then pronounced the repaired seat to be acceptable, and Mr. Grams invoked his right to refuse to work pursuant to section 128(1) of the Code which provides:

"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

All preliminary investigative requirements flowing from Mr. Grams' refusal were properly followed and subsequently Mr. Bartlett, the safety officer, arrived and conducted a thorough investigation. He met with those concerned, had Mr. Grams sit in the seat, took photographs, had Mr. Grams rock the seat from side to side and noted Mr. Grams' concern that constant wobbling of the seat with the train in motion could cause possible injuries to his back. Mr. Bartlett completed his investigation by examining the entire seat assembly, taking additional photos, sitting in the seat himself and rocking it from side to side. Mr. Bartlett concluded that the seat assembly was in

good mechanical condition and that the side-to-side movement of approximately 1/2 inch each way was not excessive.

The safety officer then gave his verbal decision in which, according to his written report, he "advised the group verbally that I could not uphold Mr. Grams' contention of a danger that was immediate and real, and could not find any condition in my examination of the seat which would cause injury without warning."

After further discussion, Mr. Bartlett reaffirmed his verbal decision following which the crew was advised by CP Rail that the tour of duty was cancelled.

Mr. Bartlett's full investigation report and decision was forwarded to the Board at Mr. Grams' request. His written decision reads as follows:

"III DECISION OF THE SAFETY OFFICER

Section 128(2)(b) reads as follows: An employee may not pursuant to this section refuse to operate a machine or thing or to work in a place where

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection 128(1) is inherent in the employee's work or is a normal condition of employment.

'Danger' as defined under Ss. 112(1) [sic] means 'any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed there (sic) before the hazard or condition can be corrected.'

I am therefore confirming my verbal decision given on the evening of 28 April 1994 to the effect that an immediate danger did not exist."

III

At the inquiry into this matter, the Board received a substantial amount of technical information related to the design of the seat (HF 18) involved in these proceedings, together with information about locomotive seating in general, cab design and a joint labour-management "cab-committee" which is developing recommendations for an on-going program to upgrade locomotive cab conditions.

Much of this information is not strictly relevant to the instant proceedings, but does provide useful background information.

The seat Mr. Grams would have occupied on the date of his refusal could have been locked in a rigid position with the use of a lock-nut, thus eliminating the lateral movement that concerned him. However, that procedure would have prevented the seat from swivelling, and in the configuration of the particular cab in which the seat was installed, that, in turn, could have presented its occupant with an awkward lack of mobility during the tour of duty.

The Board also learned that a metal bushing involved in the seat assembly was subject to wear and that while it was quite normal for a seat of the type in question when newly installed to be rigid, following a relatively limited amount of use, the bushing could wear to the extent that the type of play or wobble which concerned Mr. Grams would, to a greater or lesser degree, become evident.

It was evident from the material and evidence presented that locomotive seating and cab maintenance was a matter of general concern between the UTU and CP Rail. According to the UTU, CP Rail was not implementing some of the upgrading recommendations quickly enough and was not performing cab maintenance to the union's satisfaction. Not surprisingly, CP Rail defended its position, both with respect to maintenance and to the functioning of the cab committee and implementation of its

recommendations.

It may also be noted that at the hearing into this matter on July 4, the parties agreed that a letter from Mr. Grams' chiropractor, which was not available on the day of the hearing, would be delivered to the Board the next day. In fact, a letter from Mr. Grams' chiropractor dated **July 27, 1994** was delivered to the Board on or just after that date and was duly transmitted to the parties for comments or submissions. That letter contained comments resulting from an inspection of a train seat carried out by Mr. Grams' chiropractor on July 21, 1994. CP Rail, given the circumstances of its original agreement (at the hearing) to the admissibility of a letter concerning Mr. Grams' alleged back condition, objects strongly to the admission of a letter which is firstly, quite different in timing and content from that described at the hearing, and secondly purports to comment, in a general way, on the effects of seat instability. CP Rail forwarded, with its submissions, its own medical opinion which, in the alternative, it asks the Board to consider should the Board decide to accept the letter from Mr. Grams' chiropractor. The Board agrees that the July 27 letter is not at all consistent with the type of "medical certificate" discussed at the hearing. Accordingly, neither that letter nor the medical opinion forwarded by CP Rail will be considered in reaching a decision on this matter.

IV

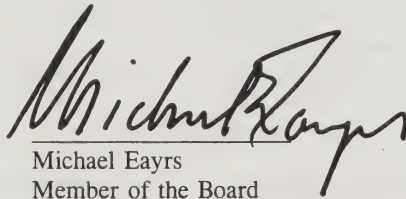
The Board has no reason to doubt that Mr. Grams may indeed have had reasonable cause to believe that the wobble in the seat he was required to occupy on April 28, 1994 might cause some back problems during his tour of duty.

That belief, however, was based on the possible effects of the seat on his personal physical condition. While the condition of the locomotive seat in question may have been somewhat less than ideal, particularly given the results of certain locomotive seating evaluations presented to the joint cab committee, the question decided by the

safety officer, and thus, the question before the Board, is whether or not the condition of the seat at the time of the investigation could be considered as constituting a danger as defined by the Code.

Following a careful review of the safety officer's investigation and the evidence presented at the hearing and without considering Mr. Grams' alleged predisposition to back discomfort or injury, the Board must conclude that danger as defined by the Code did not exist in this situation. Accordingly, the decision of the safety officer is confirmed.

Having so decided, I might remark that with regard to Mr. Grams' alleged particular medical problem, this type of matter should be addressed, in similar circumstances, in the context of an employment relationship rather than through a work refusal pursuant to the Code. As to locomotive seating in general, the parties are already dealing with that matter via the joint cab committee where, according to the Board, it should and would best be addressed.



Michael Eayrs
Member of the Board

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Summary

Syndicat professionnel des ingénieurs d'Hydro-Québec, *applicant*, Hydro-Québec, *respondent*, Syndicat des employé-e-s de métiers d'Hydro-Québec, Local 1500, Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, Local 2000, and Syndicat des technicien-ne-s d'Hydro-Québec, Local 957, *interested parties*, as well as Attorney General for Quebec and Attorney General for New Brunswick, *intervenors*.

Board File: 555-3652
CCRT/CLRB Decision no. 1080
August 29, 1994

Résumé

Syndicat professionnel des ingénieurs d'Hydro-Québec, *requérant*, Hydro-Québec, *intimée*, Syndicat des employé-e-s de métiers d'Hydro-Québec, section locale 1500, Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000, et Syndicat des technicien-ne-s d'Hydro-Québec, section locale 957, *parties intéressées*, ainsi que Procureur général du Québec et Procureur général du Nouveau-Brunswick, *intervenants*.

Dossier du Conseil: 555-3652
CCRT/CLRB Décision n° 1080
le 29 août 1994



Application for certification. Section 24 of the *Canada Labour Code* (Part I - Industrial Relations). Preliminary objection. Crown immunity. Agent of the provincial Crown operating a nuclear station.

The Gentilly II nuclear station operated by Hydro-Québec constitutes a federal work which falls within the exclusive jurisdiction of Parliament of Canada with respect to labour relations (*Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327).

Demande d'accréditation. Article 24 du *Code canadien du travail* (Partie I - Relations du travail). Objection préliminaire. Immunité de la Couronne. Mandataire de la Couronne provinciale exploitant un établissement nucléaire.

La centrale nucléaire Gentilly II exploitée par Hydro-Québec constitue un ouvrage fédéral relevant, pour la réglementation des relations du travail qui s'y rattachent, de la compétence exclusive du Parlement du Canada (*Ontario Hydro c. Ontario (Commission des relations de travail)*, [1993] 3 R.C.S. 327).

Hydro-Québec claimed immunity in its capacity as an agent of the Crown regarding the application of the *Code*. Hydro-Québec therefore requested that the Board dismiss the application on the ground that the Board did not have the jurisdiction to deal with it. The objection was allowed, and the application dismissed. The *Canada Labour Code* does not bind Hydro-Québec, an agent of the provincial Crown in right of Quebec.

The Board found that Hydro-Québec, as an agent of the provincial Crown in right of Quebec, is not bound by the *Code*, either by express terms or by necessary implication:

- The *Code* contains neither express terms nor a clear intent to bind the provincial Crown which operates a nuclear station. Parliament has not expressed any intent with respect to the provincial Crown, apart from the case provided for in section 5.1 of the *Code*, which in no way affects Hydro-Québec.

- The interpretative criteria developed by the Supreme Court of Canada to determine the legislator's intent regarding the binding of the Crown do not admit an analysis of the purpose of an Act, other than the Act at issue. Even if they did, an analysis of the *Atomic Energy Control Act (AECA)* does not show that Parliament intended to subject a provincial Crown operating a nuclear station to the application of the *Code*.

- The *Code*'s beneficent purpose is not frustrated because the provincial Crown is not bound.

Hydro-Québec did not lose its right to claim immunity by virtue of its conduct:

Hydro-Québec prétend que sa qualité d'agent de la Couronne lui fait bénéficier de l'immunité à l'encontre de l'application du *Code*. Hydro-Québec demande donc au Conseil de rejeter la présente demande au motif qu'il est sans compétence pour l'instruire. L'objection est accueillie, et la demande rejetée. Le *Code canadien du travail* ne lie pas Hydro-Québec, société mandataire de la Couronne aux droits du Québec.

Le Conseil juge qu'Hydro-Québec, en tant que mandataire de la Couronne aux droits du Québec, n'est liée par le *Code* ni par des termes exprès, ni par déduction nécessaire:

- Le *Code* ne comporte pas de termes exprès ni ne révèle d'intention claire de lier la Couronne provinciale qui exploite une centrale nucléaire. Le Parlement n'a manifesté aucune intention à l'égard de la Couronne provinciale, hormis le cas prévu à l'article 5.1 du *Code*, qui ne vise aucunement Hydro-Québec.

- Les critères d'interprétation élaborés par la Cour suprême du Canada pour déterminer l'intention du législateur de lier la Couronne n'admettent pas une analyse de l'objet d'une loi autre que celle qui est en cause. Même si tel devait être le cas, l'analyse de la *Loi sur le contrôle de l'énergie atomique («LCEA»)* ne révèle pas une telle intention du Parlement d'assujettir la Couronne provinciale exploitant une centrale nucléaire à l'application du *Code*.

- Le *Code* n'est pas privé d'efficacité du fait que la Couronne provinciale n'est pas liée.

Hydro-Québec n'a pas perdu le droit d'invoquer l'immunité en raison de sa conduite:

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LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

- Hydro-Québec did not exceed its mandate by entering into a federally-regulated area.

- Hydro-Québec did not waive its right to immunity from the application of the *Code* by being bound to the *AECA* regime. There is no nexus between the *AECA* and the *Code*. Even if a nexus did exist, it would not be strong enough to warrant the application of the exception to the immunity in accordance with the advantage-burden doctrine.

- Hydro-Québec has not waived its right to immunity by entering into a collective agreement with the SPIHQ. The waiver of immunity is a factual issue that is assessed according to the holder of the immunity. Submission presumes a voluntary and deliberate act by the holder of the immunity, and the file reveals that Hydro-Québec never intended to subject itself to the *Code*, nor did it act in such a manner as to become bound to the statutory regime instituted by the *Code*.

The Ontario Hydro judgment is not conclusive with respect to the immunity question at issue:

- The Board is of the view that the excerpt cited merely reiterates that there is no theory of constitutional intergovernmental immunity.

Regulatory vacuum. The finding that the *Code* does not bind Hydro-Québec gives rise to the situation in which neither the *Quebec Labour Code* nor the *Canada Labour Code* apply to the engineers who work at the Gentilly II nuclear station.

- Hydro-Québec n'a pas outrepassé son mandat en pénétrant dans un domaine de réglementation fédérale.

- Hydro-Québec n'a pas renoncé à son immunité à l'encontre de l'application du *Code* en se trouvant liée par le régime de la *LCÉA*. Il n'y a pas de lien entre la *LCÉA* et le *Code*. Même s'il y en avait un, il ne serait pas suffisamment étroit pour justifier l'application de l'exception à l'immunité selon la théorie de la complémentarité des avantages et des obligations.

- Hydro-Québec n'a pas non plus renoncé à son immunité en concluant une convention collective avec le SPIHQ. La renonciation est une question de fait qui s'apprécie en fonction du détenteur de l'immunité. L'assujettissement présuppose un geste volontaire et délibéré de la part du détenteur de l'immunité et le dossier révèle qu'Hydro-Québec n'a jamais eu l'intention de s'assujettir au *Code*, ni ne s'est comportée de façon à devenir liée au régime réglementaire qu'il institue.

L'arrêt Ontario Hydro n'est pas concluant sur la question d'immunité à l'étude:

- Le Conseil est d'avis que l'extrait invoqué ne fait que réitérer qu'il n'existe pas de théorie de l'immunité constitutionnelle intergouvernementale.

Vide réglementaire. La conclusion que le *Code* ne lie pas Hydro-Québec entraîne la situation par laquelle les ingénieurs travaillant à la centrale nucléaire Gentilly II se trouvent dans un vide réglementaire où n'est applicable ni le *Code du travail du Québec*, ni le *Code canadien du travail*.

Reasons for decision

Syndicat professionnel des ingénieurs d'Hydro-Québec,

applicant,

and

Hydro-Québec,

respondent,

and

Syndicat des employé-e-s de métiers d'Hydro-Québec, Local 1500, Syndicat des employé-e-s techniques professionnelles et de bureau d'Hydro-Québec, Local 2000, and Syndicat des technicien-ne-s d'Hydro-Québec, Local 957,

interested parties,

and

Attorney General for Quebec and Attorney General for New Brunswick,

intervenors.

Board File: 555-3652
CCRT/CLRB Decision no. 1080
August 29, 1994

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Mr. François Bastien and Ms. Véronique L. Marleau, Members. A hearing was held in Montréal on May 17 and 18, 1994.

Appearances

Mr. Gary H. Waxman, assisted by Louis Champagne, Eng., President of SPIHQ, for the applicant;

Mr. Jean Leduc and Mr. Yves Dallaire, assisted by Ms. Hélène Gaudreault, adviser, for the respondent;

Mr. Richard Bertrand, assisted by Mr. Luc Chabot, union adviser, for the interested parties.

Mr. Alain Gingras, for the Attorney General for Quebec, intervenor; and

Mr. C. Gabriel Bourgeois, for the Attorney General for New Brunswick, intervenor.

These reasons for decision were written by Ms. Véronique L. Marleau, Member.

I

THE APPLICATION

This case deals with an application for certification made to the Board under section 24 of the *Canada Labour Code* (Part I - Labour Relations) by the Syndicat professionnel des ingénieurs d'Hydro-Québec (SPIHQ) on October 4, 1993. In that application, the SPIHQ sought to be certified to represent all engineers working for the nuclear management branch of Hydro-Québec.

All unionized engineers at Hydro-Québec have been represented by the SPIHQ for more than 20 years by virtue of a statutory provincial certification granted under section 21(6) of the *Quebec Labour Code*, R.S.Q., c. C-27. The present application was made following the judgment rendered on September 30, 1993 in Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327. In that case, a majority of the Supreme Court of Canada found that persons working in nuclear facilities fall within the legislative jurisdiction of the Parliament of Canada, and more specifically under the *Canada Labour Code*, with respect to their labour relations.

The respondent employer, Hydro-Québec, opposed the application for certification made by the SPIHQ. It claimed immunity in its capacity as an agent of the Crown

with respect to the application of the *Code*. Hydro-Québec therefore requested that the application be dismissed on the ground that the Board did not have the jurisdiction to deal with it.

In addition to the engineers, three unions (CUPE) representing a number of employees working at the Gentilly nuclear station (the interested parties) intervened in this case, arguing, as did the applicant union, that the *Code* applies to the Hydro-Québec nuclear station despite the employer's status as an agent of the Crown.

A notice of a constitutional question having been served in accordance with section 57(4) of the *Federal Court Act*, R.S.C. 1985, c. F-7, the Attorneys General for Quebec and New Brunswick intervened and made submissions to the Board. The Attorney General for New Brunswick explained that New Brunswick's interest in this case arose from the fact that there were two applications for certification pending before the Board relating to employees of the New Brunswick Power Corporation, which has the same legal status as Hydro-Québec.

These reasons deal with this preliminary objection and address the issue of jurisdiction.

II

THE ISSUE

The only issue in this case is whether Hydro-Quebec, as an agent of the Crown in right of the province of Quebec, may claim Crown immunity, and thereby exempt itself from the application of the provisions of the *Code*.

III

THE FACTUAL AND REGULATORY CONTEXT

The facts that are relevant to this issue are not in dispute. At the hearing, counsel for Hydro-Québec introduced a series of admissions to which all parties, including the intervenors, agreed. The following statement largely adopts the actual wording of those admissions, and incorporates the legislative and regulatory provisions that form the background for the question at issue.

A. Hydro-Québec's Status as Agent of the Crown

Hydro-Québec is a Crown corporation incorporated under the *Hydro-Québec Act*, R.S.Q., c. H-5 (on this point, see G. Dion, Dictionnaire canadien des relations du travail, 2nd ed. (Québec: P.U.L., 1986), page 446, wherein Hydro-Québec is given as an example in the definition of "*société d'État*" - syn. [Crown corporation; Crown company]).

By virtue of section 13 of its enabling statute, Hydro-Québec is an agent of the Crown in right of the province of Quebec for the purposes of that statute. As such, Hydro-Québec therefore enjoys the status of agent of the Crown. That section provides:

"13. The Corporation, for the purposes of this act, is, and has been ever since the 14th of April, 1944, an agent of the Crown in right of Québec."

It is admitted that in this capacity Hydro-Québec enjoys in principle the immunity granted to agents of the Crown regarding the application of statutes. Moreover, the courts have on several occasions recognized that immunity (see inter alia Ville de Dorion c. Hydro-Québec, JE no. 92-1596 (S.C.); Hydro-Québec c. Ville de Québec,

JE no. 90-1211 (S.C.); and Transport Dubé, Quevillon Inc. et Armand Gagnon de Raymond, Chabot, Fafard, Gagnon Inc. c. Hydro-Québec, [1991] R.J.Q. 663 (C.A.).

It is also admitted that as an agent of the provincial Crown, Hydro-Québec may also claim immunity regarding the application of federal legislation. As such, Hydro-Québec may therefore raise the question of the applicability of section 17 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

"17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment."

B. Hydro-Québec's Activities

Hydro-Québec was created primarily to produce and supply power. Its mandate is described in section 22 of its enabling statute as follows:

"22. The objects of the Corporation are to supply power and to pursue endeavours in energy-related research and promotion, energy conversion and conservation, and any field connected with or related to power or energy."

The term "power" is defined in section 1(4) of the *Hydro-Québec Act*:

"(4) 'power' means electricity, gas, steam or any other form of energy, hydraulic, thermic or other."

Hydro-Québec's activities include the production, transportation and distribution of electrical power throughout the province of Quebec. In carrying out its mandate, Hydro-Québec produces electrical power at several power stations, including one nuclear station located in Gentilly (the Gentilly II nuclear station).

Hydro-Québec operates two types of power stations: hydro-electric stations and thermal stations. Hydro-Québec owns 54 hydro-electric stations and 29 thermal stations in the province. The hydro-electric stations produce about 92.4% of the electrical power generated by Hydro-Québec at its installations. The thermal stations amount to about 7.5% of that capacity, about 5.2% of which comes from the thermal stations powered by fossil energy and 2.3% comes from the thermal station powered by nuclear energy, that is, the Gentilly II nuclear station.

At the Gentilly II nuclear station, electrical power is produced using a CANDU reactor which produces thermal power, using the nuclear fission process, that transforms water into steam. This steam powers the turbine that drives the alternator, which thus produces electrical power. The production of electrical power at the Gentilly II nuclear station is accompanied by the production or use of various products such as uranium, plutonium, deuterium and deuterium oxide, cobalt-60 and tritium.

Whether a station is powered by hydraulic, fossil or nuclear energy, the electrical power produced is distributed through a very extensive integrated transportation, allocation and distribution network throughout Quebec. The network operates in such a way that all stations serve the entire province.

There are only three companies in Canada that produce electrical power for commercial purposes using the nuclear fission process. These are Ontario Hydro, which operates five nuclear stations, Hydro-Québec, which operates the Gentilly II nuclear station, and the New Brunswick Power Corporation, which operates one nuclear station at Point LePreau.

Unlike Ontario Hydro, Hydro-Québec and the New Brunswick Power Corporation are agents of the Crown. Section 5 of the *Electric Power Act*, R.S.N.B. 1973, c. E-5, provides that the New Brunswick Power Commission "... is and has always been a

Crown Corporation and an agent of the Crown and the property of the Commission is the property of the Crown..."

The Gentilly II nuclear station is operated in accordance with the terms of the operating licence issued by the Atomic Energy Control Board (the "AECB") under the *Atomic Energy Control Act*, R.S.C. 1985, c. A-16 (the "AECA") and the regulations made thereunder, including the *Atomic Energy Control Regulations*, C.R.C. 1978, c. 365 (the "AECR"). Hydro-Québec itself applied for the operating licence for the Gentilly II nuclear station and has held the licence since the station was commissioned in 1982.

Section 8 of the *AECR* prohibits the operation of a nuclear facility without a licence issued pursuant to section 9, unless exempted in writing by the AECB. Section 9(1) of the *AECR* requires that a written application be received for such a licence, the issuing of which may necessitate the provision of all or part of the following information:

"9. (1) ...

(a) *a description of the operating procedures of the nuclear facility;*

(b) *a description of the measures to be taken, including any plan in case of accident, to prevent the receipt by any person of a dose of ionizing radiation in excess of any dose specified in respect of such person in Schedule II or to prevent or minimize other hazards involved in the operation of the nuclear facility;*

(c) *a description of the measures to be taken to prevent theft, loss or any unauthorized use of any prescribed substance involved in the operation of the nuclear facility;*

(d) *a description of the measures to be taken to ensure the physical security of the nuclear facility;*

(e) a description of the qualifications, training and experience of any person involved in the operation of the nuclear facility;

(f) information respecting any arrangements that have been made to compensate any person for injury or damage resulting from the operation of the nuclear facility; and

(g) any other information necessary to evaluate the application."

Section 9(2) of the AECR describes the nature of the conditions that may be included in such a licence:

"9. (2) A licence issued by the Board pursuant to subsection (1) may contain such conditions as the Board deems necessary in the interests of health, safety and security and, without limiting the generality of the foregoing, may include conditions respecting

(a) the measures to be taken to prevent the receipt by any person of a dose of ionizing radiation in excess of any dose specified in respect of such person in Schedule II or to prevent or minimize other hazards involved in the operation of the nuclear facility;

(b) the monitoring devices and other methods for measuring the dose of ionizing radiation received by any person;

(c) the methods for detecting and recording the presence and amount of ionizing radiation;

(d) the maximum quantity and concentration of radioactive or other hazardous material that may be discharged from the nuclear facility;

(e) the method of disposing of radioactive or other hazardous material resulting from the operation of the nuclear facility;

(f) the measures to be taken to prevent theft, loss or any unauthorized use of any prescribed substance located at the nuclear facility; and

(g) the qualifications, training and experience required in respect of any person involved in the operation of the nuclear facility."

Section 10(4) of the *AECR* further provides:

"10. (4) The approval described in subsection (1) may be subject to such conditions as the Board deems necessary in the interests of health, safety and security respecting the site, design and construction of the nuclear facility."

C. Labour Relations at the Gentilly II Nuclear Station

As we mentioned earlier, the SPIHQ represents all unionized Hydro-Québec engineers; as well a single collective agreement has been negotiated by the parties. All past collective agreements have always been applied to this entire group of professionals, including those assigned to the Gentilly II nuclear station. Since that nuclear station was commissioned, the conditions of employment of the engineers covered by this application for certification and who work at that station were governed by the collective agreements entered into by Hydro-Québec and the SPIHQ. Similarly, grievances involving engineers assigned to the nuclear station were resolved under the grievance settlement procedure set out in the various collective agreements.

These collective agreements were filed with the office of the Labour Commissioner General of Quebec in accordance with section 72 of the Quebec *Labour Code*. The last collective agreement entered into by Hydro-Québec and the SPIHQ was also filed with Labour Canada (now the Department of Human Resources Development), under section 155 of the *Canada Labour Code*, on September 30, 1993; however, Hydro-Québec was not advised by the SPIHQ that it had done so.

The SPIHQ is an organization of employees incorporated under the *Professional Syndicates Act*, R.S.Q. c. S-40. As we noted above, its rights to represent the unionized Hydro-Québec engineers arose under a statutory provincial certification. That exceptional certification was granted under section 21(6) of the Quebec *Labour Code* which provides:

"The associations which were recognized by the Commission hydroélectrique du Québec (Hydro-Québec) or the City of Montréal on the 2nd of August 1969 to represent groups of persons comprising, in whole or in part, managers, superintendents, foremen or representatives of their employer in its relations with its employees and which, on such date or during the year preceding such date, were, with respect to them, signatories of a collective labour arrangement, shall from the 17th of July 1970 be certified associations with respect to them as if certification had been granted by a labour commissioner."

Since the Gentilly II nuclear station was commissioned, the unionized or non-unionized status of the engineers working in that facility has been determined on the basis of this statutory certification. As an exception to the rules governing certification of employees laid down in the Quebec *Labour Code*, the certification provided in section 21(6) allows employees who do not meet the definition of employee within the meaning of section 1 of that Act, that is, representatives of the employer, to coexist within the same bargaining unit.

By enacting section 21(6), the legislator "ratified" a factual situation, at a specific time, pertaining to the scope of the recognition that had then been obtained from Hydro-Québec and set out in a collective agreement "[f]rom the time when the recognition of the bargaining agent was within the exclusive purview of the parties and the statute played no part in regulating, defining or circumscribing such recognition ..." (Syndicat professionnel des ingénieurs de l'Hydro-Québec (C.S.N.) c. Commission Hydroélectrique du Québec, file no. M-73-1502, November 22, 1973 (T.T., Judge René Beaudry) ("Commission Hydroélectrique du Québec") (translation); see chapter 47 of the 1969 Statutes amending the *Labour Code*; see also Ville de Montréal c. Syndicat professionnel des ingénieurs de la Ville de Montréal et de la Communauté urbaine de Montréal, decision no. 88T-524 (T.T., Claude Saint-Arnaud, J.), pages 4-5).

Accordingly, "[i]t was not the rules, but rather the effects of the certification that the legislator intended to grant to these associations ..." (Commission Hydroélectrique du Québec, *supra* (translation); and Syndicat professionnel des ingénieurs de l'Hydro-Québec c. Hydro-Québec, decision no. 84T-343 (T.T., Jean Girouard, J.), page 12).

In 1986, anticipating a strike involving, inter alia, the Gentilly II nuclear station, Hydro-Québec and the SPIHQ negotiated and entered into an agreement relating to the provision of essential services in the event of a strike, which covered notably the engineers assigned to that station.

In 1989, following a number of applications under section 39 of the Quebec *Labour Code* filed in an attempt to resolve certain issues relating to the intended scope of the bargaining unit, Hydro-Québec and the SPIHQ negotiated and entered into a memorandum of agreement concerning union jurisdiction. At that time, the parties also amended appendix "A" to the collective agreement relating to union jurisdiction, which amendment was ratified by Labour Commissioner Charles Devlin under the requirements of the Quebec *Labour Code*.

In June 1993, the SPIHQ filed a new application under section 39 of the Quebec *Labour Code* involving several unionized engineers assigned to the Gentilly II nuclear station. In January 1994, the parties reached an agreement concerning the situation that was being challenged by that application, which was withdrawn, as recorded by Labour Commissioner General Robert Levac in a decision dated January 20, 1994.

It is therefore apparent that since the Gentilly II station was commissioned, the parties have negotiated and agreed on the conditions of employment of the unionized engineers assigned to that station, on the assumption that they were covered by the statutory certification granted to the SPIHQ under the statutes of Quebec.

IV
THE CONSTITUTIONAL CHARACTER OF THE
GENTILLY II NUCLEAR STATION

The legislative jurisdiction of Parliament with respect to the Gentilly II station is not at issue. The parties admitted that the conclusions of the judges who made up the majority in Ontario Hydro, *supra*, apply to the Gentilly II nuclear station operated by Hydro-Québec and that, accordingly, it must be identified as a federal work which falls within the exclusive jurisdiction of the Parliament of Canada with respect to labour relations.

We would simply recall that the legislative jurisdiction of the Parliament of Canada over nuclear stations derives from a declaration made by Parliament under section 92(10)(c) of the *Constitution Act, 1867*, and from its power to legislate in relation to matters of national interest under the peace, order and good government clause in section 91 of the *Constitution Act, 1867*.

In Ontario Hydro, the Supreme Court of Canada held by a majority judgment that the principle that labour relations cannot be dissociated from the operation of an undertaking because this is something that lies at the heart of the federal activity must also apply to a *work* that is declared to be for the general advantage of Canada. Parliament's declaratory power must be broadly construed and when a work is declared to be for the general advantage of Canada, legislative jurisdiction over such a work must be viewed as covering the work as a going concern or functional unit, and this includes control of its operation and management. For the purposes of its constitutional characterization, such a work must therefore be considered as an entity independent of the provincial *undertaking* that operates it, as a coherent and organically divisible part of the entire integrated operation:

"... In that sense, a work is an undertaking, an undertaking, however, that must include a work. ..."

(Ontario Hydro, supra, pages 368 (La Forest J.))

From this perspective, a work that is declared to be for the general advantage of Canada is a "*federal undertaking*" within the meaning of section 4 of the *Canada Labour Code*, which describes the general application of Part I (Industrial Relations):

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

(emphasis added)

Moreover, this interpretation adopts the definition of a "*federal undertaking*" enacted by Parliament in section 2 of the *Code*: sections 2(h) and (i) of the *Code* refer not only to an "*undertaking*," but also to a "*work*."

In Ontario Hydro, the Supreme Court of Canada therefore held by a majority judgment that the *Canada Labour Code* applies to the employees of Ontario Hydro who work at a nuclear facility covered by section 18 of the *AECA*, despite the fact that the *undertaking* of Ontario Hydro is in essence provincial, Ontario Hydro being a provincial instrument set up to advance provincial purposes.

Since Hydro-Québec's Gentilly II nuclear station is also a facility covered by section 18 of the *AECA*, we must necessarily conclude that the statutes governing industrial relations at that station do not fall within the legislative jurisdiction of the province of Quebec, but rather within that of the Parliament of Canada.

V

THE LAW OF CROWN IMMUNITY

A. The Principle of Crown Immunity

1. Source

Pursuant to the rule of law, the Crown itself is subject to the law. As the Privy Council held in the well-known case Eastern Trust Company v. Mackenzie, Mann & Co. Limited, [1915] A.C. 750 at 759, "... It is the duty of the Crown and of every branch of the Executive to abide by and obey the law" Fundamentally, the Crown is therefore subject to the common law: "... she is under the common law ..." (D.N. Mundell, "Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between them" (1960), 2 Osgoode Hall L.J. 56, page 58).

The common law rules, however, provide several exceptions to the application of the rule of law to the Crown: "[I]n fact it is immune therefrom whenever the law confers powers and immunities on it, which may be very numerous ..." (Dussault and Borgeat, Traité de droit administratif, Vol. I (P.U.L., 1984), pages 29-31; translation).

The principle of Crown immunity from the application of statutes is one of these exceptions. This ancient common law prerogative derives from the principle of the supremacy of Parliament. It operates in relation to legislation and establishes a presumption that statutes do not apply to the Crown:

"... it is the general rule in the construction of statutes that the Crown is not affected unless there be words to that effect, inasmuch as the law made by the Crown with the assent of the Lords and

Commons is enacted prima facie for the subject and not for the Sovereign. ... "

(Bonanza Creek Gold Mining Company, Limited v. The King,
[1916] 1 A.C. 566 (P.C.), page 586)

The fact that the Crown is subject to the common law and, conversely, that it is immune from the application of statutes thus derives, at least partially, from the distinction that exists between the sources of statute law and of the common law. While the Crown wields legislative power, it does not make the general principles of law, which derive from the common law. In the latter case, the Crown is subject to the force of precedent and the law-making power of the judge. However, this does not prevent it from amending that law through statute law, which prevails over the common law (see P. Garant, Droit administratif, 3rd ed., vol. 1 (Éd. Yvon Blais, 1991), page 47).

Therefore, in order to be immune from the application of the common law, the Crown must do something deliberate to that effect, while in terms of statute law it must rather do something deliberate in order to submit to it. This principle is applicable in Quebec as well, given the duality of the common law in that province:

"... the fundamental law in the province of Quebec in every case involving public law is English law. Why? Because, again according to the rule that there is no derogation from the common law beyond that which is expressed, the common law applies to everything that is not formally excluded ... "

(L.-P. Pigeon, Rédaction et interprétation des lois, 3rd ed. (Government of Quebec: Publications du Québec, 1986), page 110; translation; see also pages 107-110;)

Thus in the field of contracts and civil liability, unless there is an express derogation by virtue of a statute or the prerogative, the Crown is subject to the Civil Code and the Code of Civil Procedure, since they occupy the field assigned to the common law

in the other provinces in these matters: "... the Crown is bound by the Codes ..." (The Exchange Bank of Canada v. The Queen (1886), 11 A.C. 157, page 164) and "... the civil law is the '*droit commun*' of Quebec ..." (Laurentide Motels Ltd. v. Beauport (City), [1989] 1 S.C.R. 705, page 720 (Beetz J.); see also the Civil Code of Quebec, preliminary provision).

The principle that the Crown enjoys *prima facie* immunity from the application of statutes has been codified in Canada and is set out in section 17 (formerly section 16) of the *Interpretation Act*, supra.

Since the sixth edition of the Revised Statutes of Canada (1985) was proclaimed on December 12, 1988 (reflecting federal legislation current at December 31, 1984), the wording of section 17 of the *Interpretation Act* has differed slightly from the earlier version of that section, which used the expression "therein mentioned or referred to" rather than its present wording, "except as mentioned or referred to in the enactment." However, this should not be seen as an amendment of the substance of that section, since, as the explanatory note to the revision states (R.S.C. 1985, App.), the changes are designed solely to improve the language of the enactments and not to change their effect (see the *Statute Revision Act*, R.S.C. 1985, c. S-20; see also P.-A. Côté, The Interpretation of Legislation in Canada, 2nd ed. (Montreal: Éd. Yvon Blais, 1991), pages 46-50). Accordingly, in a case which was decided after that revision came into force, the Supreme Court of Canada did not distinguish between the two versions and simply applied the principles stated in earlier decisions, based on the earlier wording, to section 17 of the *Interpretation Act* (see Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 ("Friends of Oldman River"), pages 50 et seq.).

2. Applicability of Immunity to the Provincial Crown

The question of whether an agent of the Crown may enjoy the immunity conferred on it as a Crown agent was discussed at length by the Supreme Court of Canada in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225 ("AGT no. 1"). In that case, the Court had to determine whether AGT was a federal undertaking and, if it was, whether the *Railway Act* was binding on AGT. On the same day, and on the same issue, the Court ruled as to the applicability of the *Canada Labour Code* to AGT in IBEW v. Alberta Government Telephones, [1989] 2 S.C.R. 318 ("AGT no. 2").

It is now clear, since the leading decision in AGT no. 1, that Her Majesty in right of a province enjoys the Crown immunity conferred by section 17 of the *Interpretation Act* on the same footing as the federal Crown, based on the principle of the indivisibility of the Crown. In addition, there is no longer any doubt that, provided that it is acting within its jurisdiction, Parliament has the power to make the provincial Crown expressly subject to the application of its statutes (see also Her Majesty in right of the Province of Alberta v. Canadian Transport Commission, [1978] 1 S.C.R. 61, page 72). Finally, the principle that a Crown agent may enjoy immunity on the same footing as the Crown itself is also settled law (see also Canadian Broadcasting Corporation v. Attorney-General for Ontario, [1959] S.C.R. 188; Formea Chemicals Limited v. Polymer Corporation Limited, [1968] S.C.R. 754; and R. v. Eldorado Nuclear Ltd., [1983] 2 S.C.R. 551 ("Eldorado Nuclear"), page 565).

We would add that the current position of the common law, which has been adopted by the Supreme Court of Canada, takes a broad view of Crown immunity (see inter alia Eldorado Nuclear, AGT no. 1 and AGT no. 2, *supra*).

B. Exceptions to the Principle of Crown Immunity

The presumption that statutes do not apply to the Crown, however, may be rebutted if it is clear from the statute that the Crown must be bound by it, or if the facts establish that the Crown or its agent has lost its entitlement to immunity by virtue of its own conduct.

1. Exceptions Arising From the Statute: Clear Intention of the Legislator to Bind the Crown

How explicit must the statute be, under section 17 of the *Interpretation Act*, in order to bind the Crown, and to what extent does that section create an exception by necessary implication? The Supreme Court of Canada considered these questions in AGT no. 1, supra.

Relying on the decision of the Privy Council in Province of Bombay v. Municipal Corporation of the City of Bombay et al., [1947] A.C. 58 (P.C.), page 61-63, Dickson C.J. described the three tests for determining whether the legislature clearly intended to bind the Crown:

"... It seems to me that the words 'mentioned or referred to' in s. 16 are capable of encompassing: (1) expressly binding words ('Her Majesty is bound'); (2) a clear intention to bind which, in Bombay terminology, 'is manifest from the very terms of the statute', in other words, an intention revealed when provisions are read in the context of other textual provisions, as in Ouellette, supra; and, (3) an intention to bind where the purpose of the statute would be 'wholly frustrated' if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown."

(AGT no. 1, supra, page 281; emphasis added)

(a) Expressly binding words

In principle, in order for an enactment to bind the Crown, Parliament must have expressly so provided. This is particularly true since "... if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words" (Province of Bombay v. City of Bombay et al., supra, page 63). Dickson C.J. reiterated this principle as follows in AGT no. 2, at page 328:

"To bind the Crown, an enactment normally must make an express mention of or reference to the fact that the Crown or 'Her Majesty' is subject to the legislation. ..."

(b) Words that bind the Crown by necessary implication

However, even though section 17 requires a clear intention on the part of Parliament to bind the Crown, this does not mean that it is necessary to declare expressly that the Crown is bound:

"Section 16 [now 17] requires a clear Parliamentary expression of an intention to bind the Crown. This does not necessarily require that a federal enactment requires a section stating 'This Act shall bind Her Majesty' (although such a provision, as a matter of legislative drafting, would put the issue beyond doubt)."

(AGT no. 1, supra, page 280; see also AGT no. 2, supra, page 328)

In AGT no. 1, the Court examined the meaning of the words "mentioned or referred to" and concluded, after analyzing its earlier decisions, that the "necessary implication" exception was covered by that expression. It identified two situations in which it could be concluded, notwithstanding the fact that there were no express words in the statute binding the Crown, that the legislature clearly intended to bind it: (1) the case where the actual wording of the statute, by a contextual interpretation,

disclosed a clear intention to bind the Crown; and (2) the case where the purpose of the statute would be wholly frustrated were the Crown not bound (implied intention to bind inferred from the nature of the statute).

However, the Court cautioned that "[a]s an interpretive provision, s. 16 [now 17] ought not to be construed as an overbroad extension of state immunity ..." (AGT no. 1, supra, page 281). On this point, Dickson C.J. reiterated the following cardinal principle:

"The Privy Council made clear [in Bombay] that any exception to the normal Crown immunity rule based on a necessary implication should be narrowly confined. As a result, an intention to bind the Crown is not to be inferred merely from the fact that the provisions of a statute will not operate smoothly or efficiently if the Crown is not bound, nor from the fact that if the Crown is not bound the statute will have only a limited application. ..."

(page 277; emphasis added)

In the more recent decision in Friends of Oldman River, supra, La Forest J. commented on that passage, pointing out that purposive and historical methods of interpretation are helpful in analysing the context of the statute, because they provide an indication as to the legislator's intention to bind the Crown by necessary implication:

"In my view, this passage makes it abundantly clear that a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference.

That analysis however cannot be made in a vacuum. Accordingly, the relevant 'context' should not be too narrowly construed. Rather the context must include the circumstances which led to the

enactment of the statute and the mischief to which it was directed.

... "

(page 53; emphasis added)

The regulatory vacuum which would result from the operation of Crown immunity is not, however, a sufficient reason to conclude that the "purpose of the statute would be wholly frustrated".

"The fact that granting immunity will produce a regulatory vacuum with respect to AGT is insufficient and does not amount to a frustration of the Railway Act as a whole. While granting immunity unless and until Parliament chooses to amend the legislation will produce a gap in potential coverage of the Railway Act, the Act can continue to function just as it did prior to this Court's finding that AGT is a federal undertaking."

(AGT no. 1, supra, page 283; emphasis added)

2. Exceptions Arising From the Facts: Loss of Entitlement to Immunity by Virtue of the Conduct of the Crown (or Its Agent)

In AGT no. 1, the Court identified two circumstances which would prevent the Crown from claiming its immunity from the application of a statute by virtue of its conduct:

(1) where the Crown or its agent has taken advantage of the statute in question; and
(2) where the Crown agent has exceeded its mandate. It should be noted that the Court further rejected the notion of an exception based on commercial activity.

(a) The Crown or its agent has taken advantage of the statute

The first case, also known as the "waiver exception" or "benefit-burden exception", implies that the Crown has taken advantage of the statute without regard to the restrictions set out therein:

"... As stated above, at common law the Crown can gain advantages from a statute without necessarily waiving its immunity therefrom. Waiver only occurs where the Crown takes the benefit of a statute divorced from its enumerated restrictions. ..."

(AGT no. 1, supra, page 289 (Dickson C.J.); emphasis added)

See also Toronto Transportation Commission v. The King, [1949] S.C.R. 510; The Queen v. Murray et al., [1967] S.C.R. 262; and Gartland Steamship Company et al. v. The Queen, [1960] S.C.R. 315 (in which the Crown had brought an action in damages); and Sparling v. Quebec (Caisse de dépôt et placement du Québec), [1988] 2 S.C.R. 1015 ("Sparling") (in which the Crown had purchased a certain percentage of shares in a federally chartered company which made it an insider within the meaning of the *Canada Business Corporations Act*).

The doctrine of exception by waiver holds that when the Crown takes advantage of a statute, it must also bear the corresponding burdens, even though the enactment is not drafted in such a way as to bind the Crown expressly or by necessary implication (see AGT no. 1, supra, page 287; to the same effect, see C. McNairn, Governmental and Intergovernmental Immunity in Australia and Canada (Toronto: U. of T. Press, 1977), page 10, and P.W. Hogg, Liability of the Crown (Sydney: Law Book Co., 1971), page 183). The obvious reason for this is that it would be illogical and inconsistent with our intuitive sense of fairness for the Crown to receive only the benefits of a statute without also complying with the conditions attached thereto.

In AGT no. 1, the Court reiterated the principle laid down in Sparling, supra, holding that the Crown waives immunity only where there is a *sufficient nexus* between the benefit gained and the restriction imposed. The basis for the requirement of a close nexus between benefit and burden lies in the rule of interpretation holding that, while the principle of Crown immunity must be construed broadly, the exceptions to that rule must, on the other hand, be narrowly construed:

"... An exception cannot swallow a rule, which is, it seems to me, what must happen if the benefit/burden doctrine were broadened such that the Crown would be bound by all of the burdens of a regulatory statute no matter how unrelated to the benefits gained by the Crown from that statute. In other words, a fairly tight (sufficient nexus) test for the benefit/burden exception follows from the strict test for finding a legislative intention to bind the Crown. ..."

(AGT no. 1, supra, page 291)

It is not necessary, however, that the benefit gained and the restriction imposed arise from the same statute. The test applied by the Court on this point in Sparling was formulated as follows by La Forest J., cited with approval by Dickson C.J. in AGT no. 1:

"... It is quite correct to conclude that whenever the question of the application of the benefit/burden exception arises, the issue is not whether the benefit and burden arise under the same statute, but whether there exists a sufficient nexus between the benefit and burden. As McNairn, op. cit., at p. 11, puts it:

'It is not essential ... that the benefit and the restriction upon it occur in one and the same statute for the notion of Crown submission to operate. Rather, the crucial question is whether the two elements are sufficiently related so that the benefit must have been intended to be conditional upon compliance with the restriction.' [Emphasis added]"

(Sparling, supra, page 1025, cited in AGT no. 1, supra, page 288; emphasis added)

(b) The Crown agent has exceeded its mandate

This second exception arising from the facts flows from the extension of the presumption of immunity granted to Crown agents. It is based on the well-known principle that an agent that acts outside its mandate is no longer acting as an agent. Thus a Crown agent that acts for purposes outside the powers conferred on it by its

enabling statute, or its purposes as an agent, cannot enjoy Crown immunity, because it has then overstepped the public purposes for which it was created. The Supreme Court of Canada explained this principle in Eldorado Nuclear, *supra*:

"Statutory bodies such as Uranium Canada and Eldorado are created for limited purposes. When a Crown agent acts within the scope of the public purposes it is statutorily empowered to pursue, it is entitled to Crown immunity from the operation of statutes, because it is acting on behalf of the Crown. When the agent steps outside the ambit of Crown purposes, however, it acts personally, and not on behalf of the state, and cannot claim to be immune as an agent of the Crown. This follows from the fact that s. 16 of the Interpretation Act works for the benefit of the state, not for the benefit of the agent personally. ..."

(pages 565-566; emphasis added)

In AGT no. 1, it was argued that an agent of the provincial Crown which is engaged in interprovincial activities, and thus becomes a federal undertaking, loses its entitlement to immunity because it has thereby acted outside its mandate. The Court rejected that argument as follows:

"By entering into a federally-regulated area by becoming an interprovincial work or undertaking, a provincial Crown agent does not lose the immunity it would otherwise have. If activity in an area of federal jurisdiction alone sufficed to prevent the agent from invoking its immunity, s. 16 of the Interpretation Act would become a dead letter vis-à-vis the Crown in right of a province. Parliament could embrace the provincial Crown agent through general legislative wording without any need to bind the province by a mention or reference thereto."

(page 293; see also pages 297-298)

VI

THE PARTIES' ARGUMENTS

A. The Employer

In light of the principles laid down in AGT no. 1, supra, the employer argued that in the context of Part I of the *Code* and its application provisions: (1) there is no provision that contains words expressly binding the provincial Crown; (2) the wording of the *Code* does not express a clear intention to bind the provincial Crown; and (3) the purpose of the *Code* is in no way frustrated if the provincial Crown is not bound.

The employer further asserted that Hydro-Québec has not lost its entitlement to immunity by virtue of its conduct, given (1) that Hydro-Québec has not waived its entitlement to immunity from the provisions of the *Code*, since it has never taken advantage of or enjoyed the benefits that that statute may contain; and (2) that it has not lost its immunity by acting outside the mandate set out in its enabling statute or its purposes as a Crown agent, since the operation of a nuclear station clearly falls within its mandate.

B. The Applicant Union

In reply to these arguments, the union contended that the decision in Ontario Hydro, supra, is conclusive with respect to the question of immunity. In light of that judgment, Hydro-Québec cannot, in its view, take advantage of its status as an agent of the provincial Crown to exempt itself from the application of the provisions of the *Code*. The SPIHQ relied on the following passage from the opinion of La Forest J. (concurrent in by L'Heureux-Dubé and Gonthier JJ.) in Ontario Hydro, supra:

"Provincial Instrumentality

Finally, the appellant Ontario Hydro advanced the notion that federal legislation should be so interpreted as not to apply to corporations set up to advance a provincial purpose. It conceded, however, that it was not a Crown agent and so not entitled to Crown immunity in the traditional sense. The Attorney General for New Brunswick did, however, argue that Crown immunity should apply where Crown agency is established. It is, therefore, right to say that the latter argument cannot stand in view of my holding that provincial laws regarding labour relations are inapplicable to works falling within the exclusive jurisdiction of Parliament, since such legislation falls within the core of that jurisdiction."

(page 380; emphasis added)

The SPIHQ further submitted that even apart from that opinion, Hydro-Québec is subject to the *Code*, either by the necessary implication exception or by its own waiver of its immunity in the factual context of the case at bar.

According to the SPIHQ, the effect of the decision in Friends of Oldman River, supra, is to create an additional exception to the principle of immunity that applies to Hydro-Québec's case. In its view, the Supreme Court of Canada's last word in respect of Crown immunity is found not in AGT no. 1 and AGT no. 2, but rather in Friends of Oldman River. That decision establishes that the intention of the legislator may and must be examined in the context of the regulation of nuclear energy and not only on the basis of the text of the *Code*. The SPIHQ bases this proposition on the passage of that decision in which the Court stated that "... [t]he regulation of navigable waters must be viewed functionally as an integrated whole ..." (pages 60-61).

The SPIHQ referred to Hydro-Québec's operating licence for the Gentilly II nuclear station and its own admission that it is bound by the *AECA* and the regulations thereunder. On this point, it added that the employer's argument completely ignores the impact on the immunity issue of the fact that Parliament has exercised its

declaratory power under section 18 of the *AECA*. The employer is wrong to suggest that the Board rule on its immunity solely in light of the *Code*, without regard to the obvious and close nexus that exists between those two statutes and their respective regulations.

These aspects of the union's position concern two questions that arise in part from a single argument. The premise underlying this position is as follows: the *AECA* establishes a federal interest in the regulation of labour relations, and because Hydro-Québec is bound by the *AECA*, it must also be bound by the *Code*, because the *Code* regulates labour relations. By necessary implication: either the purpose of the statute establishes a clear intention to bind, or this is the only possible conclusion, given the nature of the *AECA* (its purpose would be wholly frustrated if Hydro-Québec was not bound by the *Code*). Or, by waiver: since Hydro-Québec has enjoyed the benefits from the *AECA*, it must also bear the burdens of the *Code* because it cannot get out of the restrictive rules of the entire regulatory scheme that the *Code* and the *AECA* make up. Indeed, taking into account the national and international stakes involved in the issue and the dangers inherent in the nuclear fission process, these two statutes are essential to the control of these matters and are therefore inseparable.

The SPIHQ relied on section 123.1 of the *Code* (Part II), pointing out that this section further illustrates the close nexus between the *Code* and the *AECA* and of Parliament's intention to make any employee working for an undertaking or work governed by the *AECA* subject to Part I of the *Code*. It added that, in any event, section 123.1 of the *Code* expresses a clear intention to bind the provincial Crown operating in the nuclear field. That section provides:

"123.1 The Governor in Council may by order exclude, in whole or in part, from the application of this Part or any specified provision thereof employment on or in connection with any work or undertaking that is regulated pursuant to the Atomic Energy Control Act."

According to the SPIHQ, the fact that the legislator has dealt with the case of undertakings governed by the *AECA* in the *Code* distinguishes this situation from the one at issue in AGT no. 2. Since there is no order by virtue of which the Governor in Council would have exercised this right, and since section 123.1 expressly confirms the intention of the legislator to make all undertakings regulated by the *AECA* subject to the *Code*, it follows that the submission of Hydro-Québec to the *AECA* means that it has always been governed by the *Code*. According to counsel for the SPIHQ, section 123.1 of the *Code* affects Parts I and II of the *Code* because those Parts are not mutually exclusive. On this point, it relied on Maritime Employers' Association and Termont Terminal Inc. (1991), 84 di 53; and 15 CLRBR (2d) 102 (CLRBR no. 850), in which the Board suggested that the remedies in Parts I and II of the *Code* are not mutually exclusive. The SPIHQ also based this argument on the definitions set out in sections 122(3) and 156(2) of Part II of the *Code*, which refer to Part I on certain points, and on the powers of the Board under Part II of the *Code*.

The other aspect of the union's position is based on the collective agreement entered into by the parties. The union argued that by signing that collective agreement, Hydro-Québec became bound by the *Code* because, under the *Code*, a union has bargaining agent status even if a collective agreement has been entered into as a result of provincial certification which, unknown to the parties, was invalid because the undertaking fell within federal jurisdiction (Cable TV Limited (1979), 35 di 28; [1980] 2 Can LRBR 381; and 80 CLLC 16,019 (CLRBR no. 188); and Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRBR no. 501)).

On this point, the SPIHQ alleged that it is neither relevant nor decisive that Hydro-Québec may have taken advantage of the provisions of the *Code*. According to the union, "the very fact of entering into a collective agreement or agreements therefore presumes implied acceptance of the benefits of the scheme [established] by the *Code*" (translation). It compared the signing of a collective agreement to the purchase of a

share, the situation dealt with in Sparling, supra. It argued that a collective agreement can exist only within the framework of the scheme that permits collective bargaining. The union becomes the representative of a majority of employees in the unit only under such a scheme, which, as an exception to the general rules of civil law applicable to contracts, permits the duly recognized representative to enter into legal arrangements without the consent of the minority. Accordingly, the signing of a collective agreement implies acceptance of the burdens of the *Code*.

In addition, it argued that Hydro-Québec is bound by the principle of the Crown's contractual liability, which prevails over the rights and prerogatives associated with Crown immunity. On this point, it relied on Bank of Montreal v. Attorney General of the Province of Quebec, [1979] 1 S.C.R. 565.

C. The Interested Parties

The interested parties also contended that the *Code* is a federal statute that is inseparable from the effective regulation of nuclear power because industrial relations are part of the operation and management of an undertaking as a going concern. Like the SPIHQ, the interested parties argued that "AGT was not the last word" (translation). However, in their view, the practical effect of the relationship between the *AECA* and the *Code* in terms of the submission of Hydro-Québec to the provisions of the *Code* derives not from application of the necessary implication exception, but rather from application of the waiver doctrine.

D. The Attorney General for Quebec and the Attorney General for New Brunswick

The intervenors, the Attorney General for Quebec and the Attorney General for New Brunswick, concurred in the submissions of Hydro-Québec. The Attorney General for Quebec further contended that no provision of the *AECA* is binding on the provincial

Crown by voluntary submission, and that that statute applies rather by necessary implication, since otherwise the purpose of the statute would be wholly frustrated (Friends of Oldman River, supra). In the circumstances, the waiver exception cannot apply to Hydro-Québec.

VII DECISION

It should be remembered that in determining whether the *Code* applies in this case, the question is not whether the Parliament of Canada has jurisdiction over labour relations associated with the operation of a nuclear station, but rather whether it has exercised that jurisdiction with respect to such facilities when they are operated by an agent of the provincial Crown by clearly binding the provincial Crown, or whether, on the other hand, Hydro-Québec has waived its immunity by its conduct.

A. Is Hydro-Québec Bound by the Code Expressly or by Necessary Implication?

1. Intention to Bind the Provincial Crown on the Face of the Statute

(a) The conclusions in AGT no. 2

In AGT no. 2, the Supreme Court of Canada held that Part I of the *Code* contained no provision that was expressly binding on the provincial Crown. It further held that Parliament had not clearly expressed the intention, in that context, of binding the Crown, and thus Part I of the *Code* did not bind the provincial Crown by necessary implication.

This conclusion resulted from an analysis of the application of Part I of the *Code*. The Court held that "[i]t is evident that s. 108 of the *Code* makes no express reference to the Crown as being bound thereto" (AGT no. 2, supra, page 326). The Court added:

"... Rather, Part V is made applicable generally to 'employees who are employed upon ... the operation of any federal work, undertaking or business. ...' As was said in AGT v. CRTC, it is precisely against such general provisions that s. 16 [now 17] of the Interpretation Act protects the Crown."

(pages 326-327)

The Court then examined section 109 (now sections 5 and 6) which expands the application of Part I of the *Code* by extending it to certain federal Crown corporations. Sections 5 and 6 of the *Code* provide:

"5. (1) This Part applies in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of the employees of any such corporation, except any such corporation, and the employees thereof, that the Governor in Council excludes from the operation of this Part.

(2) The Governor in Council may, pursuant to subsection (1), exclude from the operation of this Part only those corporations in respect of which a minister of the Crown, the Treasury Board or the Governor in Council is authorized to establish or to approve some or all of the terms and conditions of employment of persons employed therein.

(3) Where the Governor in Council excludes any corporation from the operation of this Part, the Governor in Council shall, by order, add the name of that corporation to Part I or II of Schedule I to the Public Service Staff Relations Act.

6. Except as provided by section 5, this Part does not apply in respect of employment by Her Majesty in right of Canada."

The Court concluded that these sections did not have the effect of making an agent of the provincial Crown subject to the provisions of the *Code*, even if it was a federal undertaking. A stipulation that the federal Crown is not bound by the *Code* does not imply, a contrario, that the provincial Crown is bound. Much clearer wording would be necessary before such a conclusion could be drawn. Section 17 of the *Interpretation*

Act requires a clear intention by Parliament to bind the Crown, whether federal or provincial. Hence the conclusions that:

"... AGT, as a provincial Crown agent, could only be covered by the general wording in s. 108 [section 4], if bound in any way to Part V [Part I] of the Code.

In my opinion the express exclusion of part of the federal Crown under s. 109 [now 5 and 6] of the Code offers little support for the view that Parliament intended agents of the Crown provincial to be bound under the general words of s. 108 [now 4] ...

...

... Given section 109(4)'s purpose of making certain that the federal Crown is immune (except for s. 109(1), (2) and (3) [now s. 5]), it can hardly be used to ground an inference that Parliament clearly intended at the same time to bind the provincial Crown. Parliament could easily have included provincial Crown employees as explicitly as it did for certain federal Crown employees in s. 109(1), (2) and (3). The provincial Crown cannot be prejudiced by the fact that Parliament did not demonstrate the same abundance of caution with respect to provincial Crown interests as with respect to federal Crown interests. The fact that Parliament may have been immediately concerned with protecting certain interests of the federal Crown (the Crown which Parliament is most concerned with) is as consistent with Parliament having no intention at all regarding the provincial Crown as with it having the intention to bind the provincial Crown. ... A provision in a statute which excludes the federal Crown or part of the federal Crown does not, without much clearer contextual indicators, raise an inference that any other part of the Crown, in this case the provincial Crown, is intended to be bound: see Her Majesty in right of the Province of Alberta v. Canadian Transport Commission, [1978] 1 S.C.R. 61, at p. 68."

(AGT no. 2, supra, pages 327-329; emphasis in the original)

In our view, the decision in AGT no. 2 clearly answered the question of whether Parliament had the intention of making the provincial Crown or one of its agents subject to the *Code*: in enacting the *Code*, Parliament did not intend to bind the

provincial Crown. Accordingly, an agent of the provincial Crown, in principle, enjoys Crown immunity from the application of the *Code*, having regard to section 17 of the *Interpretation Act*.

In fact, the enactment of the *Canada Labour Code* (then the product of the consolidation of the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, and four other statutes, see *Canada Labour Code*, S.C. 1966-67, c. 62, section 30) coincided with the advent of collective bargaining in the federal public service and the creation of a separate labour relations scheme to regulate that sector (see the *Public Service Staff Relations Act*, S.C. 1966-67, c. 72, which became R.S.C. 1985, c. P-35 (the "PSSRA"). In both cases, Parliament granted most employees of Her Majesty in right of Canada the right to bargain collectively.

The establishment of institutions, notably the Public Service Staff Relations Board and this Board to achieve these objectives, clearly demonstrates that Parliament's intention in enacting the *Code* and the *PSSRA* was not to make the provincial Crown subject thereto, but rather to provide employees and employers in the private sector who fell within its jurisdiction, as well as employees of the Crown in right of Canada, with a scheme for labour relations (see Canadian Forces Exchange System (CANEX) (1977), 24 di 183; and [1978] 1 Can LRBR 219 (CLRB no. 109), pages 184-186; and 220-222; Government of the Northwest Territories and Housing Corporation of the Northwest Territories (1978), 31 di 165; [1979] 2 Can LRBR 521; and 78 CLLC 16,171 (CLRB no. 152); The House of Commons (1984), 55 di 129; 6 CLRBR (NS) 354; and 84 CLLC 16,024 (CLRB no. 456); and The Royal Canadian Mounted Police (1986), 67 di 27; and 14 CLRBR (NS) 46 (CLRB no. 587); and Dussault and Borgeat, Traité de droit administratif, 2nd ed., vol. II (Québec: P.U.L., 1984), page 227).

(b) Legislative changes since AGT no. 2

As a result of the principles laid down in AGT no. 2, Parliament has recently amended Part I of the *Code* to include specific mention of corporations which are agents of the provincial Crown operating in the field of telecommunications that fall within federal jurisdiction. Section 3 of the new *Telecommunications Act*, 40-41-42 Eliz. II, c. 38, assented to on June 23, 1993, expressly provides that "[t]his Act is binding on Her Majesty in right of Canada or a province," and section 88 of the Act amended section 5 of the *Code* by inserting an express provision that Part I of the *Code* applies in respect of a Canadian carrier that has provincial Crown agent status. This new section of the *Code* provides:

"5.1 This Part applies in respect of any Canadian carrier, as defined in section 2 of the Telecommunications Act, that is an agent of Her Majesty in right of a province and in respect of the employees of the carrier."

As counsel for Hydro-Québec observed, while this demonstrates the clear intention of the legislature to make telecommunications undertakings operated by a provincial Crown subject to the *Code*, there is no similar provision in Part I of the *Code* with respect to undertakings operating in the nuclear field.

Since AGT no. 2, the sections that circumscribe the application of Part I of the *Code* have not been otherwise amended to state expressly that the provincial Crown or one of its agents that operates a federal undertaking or the employees of that undertaking are bound. Only section 5.1, supra, has been added to provide for such submission in the very specific case of a federal telecommunications undertaking. Apart from that situation, it is therefore still evident that Parliament has not in clear terms made the provincial Crown subject to Part I of the *Code*, as an interpretation a contrario of that section confirms.

(c) The impact of the provisions of Part II of the Code

In this context, the Board considers that there is no support in the Act itself for the argument that section 123.1 of the *Code* shows Parliament's clear intention to bind an agent of the provincial Crown which, like Hydro-Québec, is regulated pursuant to the *AECA* in the operation of its nuclear stations.

Section 123.1 of the *Code* is merely an indication that some undertakings may be excluded from the application of Part II of the *Code*. Moreover, section 123.1 of the *Code* when argued a contrario covers all undertakings regulated pursuant to the *AECA* and does not deal with Crown agents. As the Attorney General for Quebec pointed out, this type of provision is precisely one against which section 17 of the *Interpretation Act* protects the Crown. In our view, this reason alone would suffice to conclude that this section cannot be invoked to argue that a Crown agent regulated pursuant to the *AECA* must be bound by the *Code*.

However, it was asserted that this section also affects Part I of the *Code* and that as such it is relevant to the resolution of the question at issue, since section 123.1 is "another indication of the close nexus that exists between the *Code* and the *AECA*" (translation). This nexus confirms, it is said, the intention of the legislator to make any undertaking regulated pursuant to the *AECA* subject to the *Code*, including undertakings operated by a Crown agent. With respect, section 123.1 of the *Code* cannot be used to confirm the existence of such a nexus (in fact, there is no nexus between the *AECA* and the *Code*, as our subsequent analysis shows).

As an exception to the application of Part II of the *Code*, by providing that undertakings regulated pursuant to the *AECA* may be excluded in whole or in part from that Part, section 123.1 has no impact on Part I of the *Code*. In fact, the scope of application and the definitions of each Part of the *Code* are unique to it, and their

distinctiveness becomes apparent when their provisions are examined. The expressions used do not have the same meaning or application in Part I, II or III of the *Code*. The term "employee" alone confirms the distinction between the three Parts of the *Code* in terms of the extent of their respective application. Moreover, while Part I (Industrial Relations, section 4) regulates only collective labour relations, Parts II (Occupational Safety and Health, section 123) and III (Standard Hours, Wages, Vacations and Holidays, section 167) of the *Code* extend to both individual and collective labour relations. In addition, unlike Part I, Parts II and III of the *Code* generally prescribe the content of collective agreements in that they establish the basic norms with which such agreements must comply, and failing which charges may be laid against contraveners (see sections 148 et seq. [Part II] of the *Code*) or agreements may be void (see section 168 [Part III] of the *Code*). Thus the three Parts of the *Code* could very easily be the subject of separate statutes. This is, moreover, how these subject matters are generally dealt with at the provincial level.

The SPIHQ relied on the decision in Maritime Employers' Association and Termont Terminal Inc., *supra*, to argue that Parts I and II of the *Code* are not mutually exclusive. In its view, that confirms that section 123.1 may and must be interpreted as also applying to Part I. In our opinion, that decision does not support such an interpretation of the *Code*.

In that case, the employer had argued that the Board had no jurisdiction to hear a complaint made under the provisions of Part I of the *Code* when, in its view, the complaint was essentially based on violations of Part II of the *Code*. The Board rejected that objection on the ground that the rights at issue in that case were not rights protected by Part II of the *Code*, but rather rights protected by Part I. Certainly, the union representation rights at issue did concern a question of safety. However, the safety aspect was not an issue other than as a labour standard. In other words, while the safety standard lay at the *origin* of the dispute, it was not the *subject*

matter of the dispute nor the *question at issue*, which clearly fell within Part I of the *Code* (interference in union activities and scope of the right of access to the employer's premises). Therefore, the remedies provided in Part II to sanction violations of the health and safety rules could be of no assistance in that case.

What the Board said in that case was simply that a union's representation rights extend as well to health and safety issues and that the fact that Part II of the *Code* regulates the health and safety aspects of a work place does not mean that a union must be deprived of its Part I remedies when the subject matter of the alleged interference relates to its representation rights in respect of health or safety matters.

With respect to the definitions set out in sections 122(3) and 156(2) of Part II of the *Code*, some aspects of which refer to Part I, even assuming that Part II might express an intention to bind the provincial Crown, a proposition we have rejected, we would not consider this as authority for a finding that there is a relationship between Parts I and II of the *Code*. These are simply cases where the legislator has used the technique of incorporation by reference to simplify the wording of the statute by avoiding repetition (on the technique of reference, see inter alia P.-A. Côté, The Interpretation of Legislation in Canada, *supra*, pages 70-82; J. Desjardins and J. Legault, "L'incorporation par renvoi dans l'exercice du pouvoir réglementaire à l'échelon fédéral" (1991), 70 Can. Bar Rev. 244; and in the context of incorporation by reference of provincial statutes, see Rowan Canada Limited (1992), 89 di 128; and 92 CLLC 16,066 (CLRB no. 961), affirmed by the Federal Court of Appeal in Seafarers' International Union of Canada v. Canada Labour Relations Board (1993), 93 CLLC 14,057 (F.C.A.); application for leave to appeal dismissed by the Supreme Court of Canada).

Similarly, the powers of the Board with respect to Part II of the *Code* are no more conclusive in establishing that there is a connection between Part I and Part II of the *Code*. Certainly, Parliament has given the Board some authority over matters

regulated by Part II of the *Code*. However, the Board's jurisdiction in this area is distinct from the jurisdiction it exercises under Part I of the *Code*. It is limited to appeals of safety officers' decisions which can be referred to it when no danger is found (section 129(5)) and to complaints by employees who consider themselves to have been disciplined by their employer because they exercised their right to refuse to work in dangerous conditions or because they complied with the provisions of Part II of the *Code* (sections 133 and 147 of the *Code*).

Ultimately, to accept the union's argument we would be to distort the clear provisions of the *Code* by attributing a meaning to some of its provisions that is inconsistent with and even contrary to its purposes. Thus, the Board must conclude that Parliament has not, in the context of Part I of the *Code* and its application provisions, clearly expressed the intention of binding an agent of the Crown in right of a province which is operating a nuclear station.

2. Where an Intention to Bind the Provincial Crown Arises From the Purpose of the Statute
- (a) Contextual analysis of the intention of the legislator and the nexus between the AECA and the Code

According to the SPIHQ, however, the submission of Hydro-Québec to the *Code* in respect of the Gentilly II nuclear station derives not from the provisions of Part I of the *Code*, but rather from the nexus between the *AECA* and the *Code*. In its view, the decision in Friends of Oldman River confirms that the nexus found in Ontario Hydro between health and safety issues in nuclear facilities and the personnel working there is relevant in analyzing the intention of the legislature in respect of immunity and, in this case, this nexus shows an intention to bind to which one is irresistibly drawn through logical inference.

In the opinion of the Board, the decision in Friends of Oldman River does not have the effect sought by the union. Certainly the Court held, in that decision, that in the absence of clear provisions indicating the intention of the legislature it is permissible, and even proper, to examine the statute at issue in relation to the context in which it was enacted; and this may imply an analysis of the regulations thereunder, in order to determine its object, to see whether its purpose would be wholly frustrated if the Crown were not bound. However, in our view, that is in no way affirming that the regulations relating to a statute *other* than the statute at issue should be examined.

The nexus between the *AECA* and Part II of the *Code* argued by the SPIHQ does not change the nature of the issue to be resolved: whether or not Parliament intended to bind Hydro-Québec to the application of the provisions set out in Part I of the *Code*. Besides, in Ontario Hydro, the nexus found between health and safety issues and the activities of employees working in the field of nuclear power was analyzed only for the purposes of constitutional characterization, and that analysis cannot be used for the purposes of immunity.

The approach proposed by the union for interpreting the intention of the legislator in this case consists precisely in treating the tests for constitutional interpretation in the same manner as the tests for statutory construction. With respect, such an approach is contrary to the principles of interpretation that apply to immunity. To adopt it would amount to sanctioning a substantial enlargement of the scope of the test for applying necessary implication exception.

In constitutional terms, once a work is found to be a "federal undertaking" because it has been declared to be for the general advantage of Canada, labour relations in respect of the operation of that work fall within federal jurisdiction (Ontario Hydro, *supra*). This is so because labour relations are considered to be inseparable from the operation or management of any work taken as a going concern, and not because labour relations per se have a direct impact on the subject matter of the declaration.

In other words, this is based on the fact that labour relations are an integral part of the *undertaking* (or the operation of the work as a going concern) and not because labour relations are, by nature, a matter of *national interest* such as would warrant a declaration by the Parliament of Canada under section 92(10) of the *Constitution Act, 1867*.

Moreover, while the constitutional case law recognizes that labour relations in an undertaking are closely related to the operation of the undertaking and are an integral part thereof, it also recognizes that this rule does not prevent a provincial Crown from enjoying immunity from the application of a federal statute, as the Supreme Court of Canada held in AGT no. 1. Otherwise, the exception would become the rule, and this would clearly be contrary to section 17 of the *Interpretation Act* which requires that Parliament clearly express its intention to bind the Crown, particularly since "... if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words" (*Province of Bombay v. City of Bombay et al.*, *supra*, page 63 (Lord du Parc)). To paraphrase the comments of Dickson C.J. in AGT no. 1, *supra* (page 291), an exception cannot swallow a rule, which is, it seems to us what must happen if the necessary implication exception were broadened such that the Crown would be bound by a regulatory statute dealing with a subject matter ancillary to a main head of jurisdiction, simply because a regulatory statute dealing with that main head would bind the Crown.

On this point, the Board has carefully noted the ruling of the highest court in the land, which the Attorney General for New Brunswick brought to our attention:

"... Haphazard attempts on the part of the judiciary to reformulate the law on Crown immunity not only raise delicate constitutional issues but they risk producing even more of a 'hodge podge' of rules instead of producing the rational and carefully designed set of rules appropriate to contemporary notions of government and citizen rights that the Ontario Law Reform Commission has called for."

(Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, page 121)

This being said, even if it were appropriate to consider the nexus that exists between the *AECA* and the *Code* to determine the legislator's intent in respect of immunity, this would not affect our conclusion, because in our view these two statutes are in no way related. In order to dispel any ambiguity that may persist on this point, we shall briefly examine the two statutes.

Part I of the *Code* lays down a complete scheme for regulating labour relations, and more specifically the scheme for collective bargaining that applies to an undertaking under federal jurisdiction. It establishes this Board, and gives it the mandate to administer the scheme. This structure allows for union recognition: the *Code* lays down the rules under which unions are certified as bargaining agents, collective agreements are negotiated and strikes and lock-outs may legally take place. The *Code* enables the Board to establish and review the collective bargaining structure of an undertaking to ensure that an appropriate balance of power is maintained, while promoting the establishment of sound and effective labour relations. With the exception of a dispute relating to the signing of a first collective agreement, Part I of the *Code* does not permit the Board to prescribe the content of a collective agreement. All that Part I of the *Code* requires is that the collective agreement have a specific duration and that it contain a grievance settlement procedure.

The concept of collective bargaining is based on the premise that a "rectified" balance of power will lead to fairer results. The main value of the collective bargaining scheme is therefore its distributive and utilitarian justice. However, that is not its sole function: the collective bargaining scheme also provides for the establishment of a regulatory framework in the work place, through the mechanism of a negotiated collective agreement, which allows for labour relations to be regulated in an objective manner. From this perspective, collective bargaining is intended as the instrument that best favors industrial justice, by embodying the vehicle that will lead to the

establishment of a "rule of law" or a social order in the work place, true to Dicey's ideals.

On the other hand, as Lamer C.J. noted in Ontario Hydro, *supra*, "... none of the provisions seek to regulate the collective bargaining process, or refer explicitly to terms or conditions which must be included in collective agreements covering such workers ..." (pages 342). Certainly the *AECR* shows in a more general way Parliament's interest in health and safety in nuclear stations. Nonetheless, while it may be said that this expresses a federal interest in the employment of those persons who operate such stations (Ontario Hydro, *supra*, pages 342), this in no way establishes a nexus between the control of nuclear energy and the regulation of labour relations.

The *AECR* enables the AECB to impose a number of obligations on licence-holders relating to employment. For instance, the operating licence issued to Hydro-Québec for the Gentilly II nuclear station imposes, inter alia, requirements relating to the training and experience of the personnel working at the nuclear station.

Such requirements relate to health and safety and, to a lesser extent, to hiring standards, by establishing a threshold of competence that is sufficient to ensure the safety of the facility. Certainly the licence imposes an obligation to report to the AECB any actual or impending instances of industrial disputes. However, the same holds true for civil demonstrations that could affect the safety or security of the nuclear facility. Obviously, these again, are obligations that fall within the sphere of preventing dangers associated with the operation of such a facility. The requirements imposed therefore concern labour *standards* and prevention, and not the *process* for entering into a collective (as opposed to individual) labour contract, which Part I of the *Code* is designed to regulate.

Moreover, it should be noted that the requirements imposed by the AECB are higher than those imposed by Part II of the *Code*, which establishes basic occupational health

and safety standards that are applicable to any federal undertaking. According to the rule of interpretation holding that the specific prevails over the general, it follows that the AECB need not use Part II of the *Code* in order to guarantee adequate control over the operation of a nuclear facility, since the AECB itself establishes the requirements that it considers to be necessary in this regard and which, moreover, exceed the obligations imposed by Part II of the *Code* on any federal undertaking. In any event, health and safety matters, as already noted, do not come under Part I of the *Code*, whose aim is to alter the parties' legal status (by permitting the transformation of an individual employment contract into a collective contract), as opposed to Part II of the *Code*, which introduces normative provisions and obligations in respect of the protection of the health, safety and physical integrity of the workers in order to eliminate the very causes of the dangers found in the work place.

Ultimately, this analysis shows rather that the objectives of the *AECA*, and of the regulations thereunder, as they relate to protecting health and safety may be achieved using procedures that are found in that regulatory scheme, that is, a nuclear station's operating licence, which imposes requirements that considerably exceed those that might be imposed by Part II of the *Code*.

The union's position is that the possibilities of labour disputes and the serious health and safety repercussions that might attach to such disputes in this context, nonetheless provide the basis for finding a nexus between the production of nuclear power and labour relations. The union contends that this warrants the conclusion that the *Code* is useful and even necessary if there is to be appropriate control of the applications of nuclear power. This argument rests on the following passage from the opinion of La Forest J. in Ontario Hydro, *supra*:

"... With the inherent potential dangers associated with nuclear fission, industrial safety — indeed the safety of people hundreds of miles from a nuclear facility — is necessarily dependant on the personnel who operate the facility. A strike, and indeed mere

carelessness, could invite disaster. As the Attorney General of Canada put it: 'The whole purpose of federal regulation of nuclear electrical generating plants would be frustrated if Parliament could not govern the standards and conditions for employment of the individuals who operate the plant, both for their own safety, and for that of the general public.'

Quite apart from this doomsday scenario, what was said in the context of a work subject to the declaratory power applies equally to a work over which Parliament has jurisdiction under its general power in relation to matters of national concern. Labour relations are an integral part of that jurisdiction. I observe that this approach had been adopted in Pronto, supra."

(pages 379-380; emphasis added)

There is no doubt that the legal status of the parties, which derives from the type of labour contract entered into by them (collective, in this case), may have a certain ricochet effect on the obligations imposed in relation to eliminating the causes of dangers to workers' health, safety and physical integrity under the AECA scheme. The obligation to report any actual or impending instances of industrial disputes to the AECB provides a clear indication on this point.

In such a case, however, we must note that it is not the scheme established by the Code that is significant, but rather the dispute that may arise from a difference between the parties. Accordingly, while the concerns in relation to control of nuclear power disclose an interest in preserving industrial peace, nonetheless it is the parties who must minimize the risk of disputes. In the best of cases, the Board can only promote the peaceful settlement of disputes. As the Woods Task Force noted in commenting on collective bargaining in a changing world:

"124. Nevertheless, collective bargaining must be judged by its function. It is a form of strategy in a mixed enterprise economy for the protection of the interests of labour. As such it is a means to an end, not an end in itself. ..."

Canadian Industrial Relations: The Report of the Task Force on
Labour Relations (Ottawa: Privy Council Office, December 1968)
(Chair: H.D. Woods); emphasis added)

Moreover, from this perspective, in order for the *Code* to be useful in controlling nuclear power, it would have to be designed to meet the needs that arise in that sphere of activity and it would have to be possible to apply the policies that the Board adopts to promote sound labour relations.

In this case, the effect of determining that the nuclear station operated by Hydro-Québec is federal in nature is to fragment labour relations within that undertaking, without regard to the concerns associated with maintaining sound labour relations. Thus at Hydro-Québec we now find two groups of engineers: those who work at the Gentilly II nuclear station, who fall within federal jurisdiction, and all other engineers, who remain subject to provincial jurisdiction.

And yet, overall, the Board's policies promote collective bargaining on as broad a base as possible (see inter alia Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59); Canadian Pacific Limited (1992), 88 di 126 (CLRB no. 944), page 134; Canadian National Railway Company (1992), 88 di 139 (CLRB no. 945), page 147; Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675); Canadian Broadcasting Corporation (1991), 84 di 1 (CLRB no. 846); and Radio Acadie Ltée, CJVA-AM, and Radio de la Baie Ltée, KCLE-FM (1994), as yet unreported CLRB decision no. 1071, page 33). This is precisely because the Board believes this to be more favourable to the maintenance of industrial peace, by promoting the establishment of sounder labour relations between the parties. Several factors justify this preference: greater stability in the economic sector involved, the interest in maintaining an appropriate balance of power that will promote the establishment of social order in the undertaking, administrative efficiency, greater ease of collective bargaining and the establishment

of common conditions of employment, reduction of jurisdictional conflicts, a history of collective bargaining and labour relations between the parties, preservation or expansion of employees' lateral mobility and elimination of overlap among jobs performed by members of different bargaining units (see inter alia Canadian Pacific (944), *supra*, pages 135-136; and Canadian National Railway Company (945), *supra*, pages 148-149).

In these circumstances, one has to question how the application of the *Code* could be useful in the pursuit of the objectives of the *AECA* scheme relating to prevention, since the Board could intervene only where there was a fragmented bargaining unit and would then have jurisdiction over only a fraction of the original unit.

In reality, from the point of view of the *Code* and from the perspective of the bargaining structure, the best way of promoting the objectives of the *AECA* relating to prevention would probably be to preserve the status quo ante. This would avoid inappropriate fragmentation of the bargaining unit which otherwise, as currently defined, already meets the tests laid down by the Board in all respects, and would preserve a collective bargaining structure which has stood the test of time by proving that it has promoted the preservation of industrial peace for many years. As the Board has stated in the past, "... the *"balkanization"* of an existing bargaining unit is a very serious matter, especially when the unit at issue is a single all-encompassing unit of all the employees of an employer or of all the employees in a well distinguishable group ..." (Canadian Pacific Limited (59), *supra*, pages 33; 369-370; and 16,156; see also Atomic Energy of Canada Ltd. (1977), 25 di 377; [1978] 1 Can LRBR 92; and 78 CLLC 16,128 (CLRB no. 107), pages 384; 98; and 398).

Further, in order to be able to contribute to reducing the risks associated with labour disputes in this context, the *Code* would have to make effective provision for procedures that would meet the needs relating to this sphere of activity, i.e., the operation of a nuclear station. Unlike the *Quebec Labour Code*, the *Canada Labour*

Code contains no procedure that guarantees the provision of essential services in the event of a strike. Moreover, it should be pointed out that the operating licence for the Gentilly II nuclear station issued by the AECB already stipulates that there shall be in attendance at all times sufficient qualified personnel to ensure the safe operation of the nuclear facility.

The same argument applies as well to the scheme in the federal public service, which allows the government to define the level of service that must be maintained during a labour dispute. More specifically, the *PSSRA* authorizes Parliament to designate as essential all employees whose duties are related to the safety and security of the public, and not only those whose presence at work would be necessary in the interest of the safety of the public (see Canadian Air Traffic Control Association v. The Queen, [1982] 1 S.C.R. 696). Moreover, unlike that of the *Code*, the collective bargaining scheme established for the federal public service provides the unions with the option of taking the strike route or filing for compulsory arbitration.

Finally, it is important to recall that under the *Code* the factor that opens the way to the Board's power to intervene is not the real or apprehended *danger* that may be associated with a strike but rather, the *period* during which it occurs. Accordingly, the solutions to what La Forest J. described as a "doomsday" scenario in Ontario Hydro, *supra*, could not be found the *Code*, at least not as it is currently worded. If a strike occurs during the period which the *Code* allows, the nature of the dispute is not changed by the fact that it might cause a danger to the public: the strike is lawful, and in such a case the Board has no power to intervene. If, on the other hand, the strike occurs outside the period provided, the Board then has power to order the employees back to work. However, as we noted earlier, that power does not extend to the issuing of orders relating to the maintenance of essential services or the issuing of instructions relating to health and safety.

Accordingly, even assuming a Kafka-like scenario, it would not go any farther toward establishing a nexus between control of nuclear power and the scheme established by the *Code* for regulating labour relations, bearing in mind that the purpose of the *Code* is corrective justice. Certainly a labour dispute may have serious repercussions if it involves violence. Regretfully perhaps, but undeniably, the *Code* is not "armed" to counter such a possibility.

For these reasons, the theory that there is a nexus between the *AECA* and the *Code* must be rejected.

- (b) Intention to bind when the purpose of the statute would be frustrated if the Crown were not bound

The union's argument in this respect is that the *AECA* establishes a scheme which, because of its purposes, cannot be effective unless the *Code* is applied as a corollary. We have found that there is no nexus between the *AECA* and the *Code* and that, even assuming that such a nexus existed, it would not be relevant to determining the intention of the legislator with respect to the *Code*. The question at issue is one of statutory interpretation, and as Professor Pierre-André Côté explains in The Interpretation of Legislation in Canada, *supra*, "[t]o interpret an enactment is to establish the meaning and scope of the rule it expresses..." (page 7; emphasis added). As well, even when purposive considerations may appear relevant in interpreting the intention of the legislator, it does not change the starting point for the interpretation process, which is always the enactment being examined; here, this is not the *AECA* but the *Code*.

In the specific context of the *Code*, the regulatory vacuum argument has already been expressly rejected by the Supreme Court of Canada in AGT no. 2, *supra*:

"It was also submitted that the whole of the provincial Crown must implicitly be 'mentioned or referred to' in the general application section, s. 108, because otherwise a legal vacuum would exist in labour legislation. Provincial labour regulation would be inapplicable to AGT employees as a matter of constitutional law and federal legislation would be inapplicable due to immunity of the Crown arising as a matter of statutory interpretation. Assuming the correctness of this submission, the gap created by Parliament's failure to bind the provincial Crown in the Code may be inconvenient or even undesirable as a matter of operation or policy, but until Parliament chooses to fill the vacuum with an express statement that gives effect to this concern, the role of the judiciary is only to determine if the legislation would be wholly frustrated should the Crown in right of a province be excluded from the relevant provisions of the statute. Any suggestion that the purposes of Part V [now Part I] of the Code would be wholly frustrated should the provincial Crown not be bound thereto must be rejected. The vast majority of employees of federal undertakings would continue to be covered by Part V of the Code despite the immunity of the Crown in right of the provinces therefrom."

(page 330; emphasis added)

Applying this principle, even if granting immunity to Hydro-Québec were to result in a regulatory vacuum, this would not operate to frustrate the purpose of the *Code* which, we would recall, is the only statute at issue in this case. This is particularly evident since the fact is that several nuclear stations in Canada are not operated by a Crown agent.

For these reasons, we find that Hydro-Québec, as an agent of the Crown in right of the province of Quebec, is not bound by the *Code*, either by express mention or by necessary implication. The only possible conclusion from an analysis of the *Code* that is both textual and contextual or purposive is that Parliament has not expressed any intention with respect to the provincial Crown, apart from the case provided for in section 5.1 which in no way affects Hydro-Québec.

B. Has Hydro-Québec Lost Its Entitlement to Immunity by Virtue of Its Conduct?

1. The Exception of Waiver by Virtue of the Nature of the Activity

It is admitted that Hydro-Québec has not waived its immunity by entering into a federally regulated field. Obviously, by operating a nuclear station, Hydro-Québec is pursuing its objectives as an agent of the Crown in right of Quebec, that is, supplying power (see the *Hydro-Québec Act*, supra, section 22(1)4; and AGT no. 1, supra, pages 293, 297-298). Hydro-Québec has therefore not waived its immunity by acting for purposes outside its mandate.

2. The Exception of Waiver by Virtue of the Benefits Taken From the Scheme Created by the AECA and the Regulations Thereunder

The argument made in this context is that Hydro-Québec's waiver of its immunity in respect of the legislation and regulations governing the operation of its nuclear undertaking constitutes a waiver of its status as agent of the Crown with respect to the operation of its nuclear undertaking as a whole, including labour relations.

Hydro-Québec's waiver of its immunity with respect to the federal legislation applicable to the operation of its nuclear undertaking, it is alleged, at the same time entailed a similar waiver with respect to the *Code*, which is intended solely to regulate the labour relations process that is so closely related to the operation of the undertaking. On this point, it is argued that Hydro-Québec's situation is completely different from AGT's, since AGT had never waived its immunity with respect to the *Railway Act* or any other federal statute that might regulate its interprovincial activities. The concrete effect of this waiver would then be to make any federal legislation that is inseparable from the effective regulation of nuclear power, including labour relations, applicable to Hydro-Québec.

Let us first state that in accordance with the principles laid down by the Supreme Court of Canada in Sparling, *supra*, the waiver of immunity exception applies even if the benefits and burdens do not arise from the same enactment and even if the Crown or its agent has not directly tried to rely on the statute in question or another federal statute. Let us recall, however, how the Supreme Court of Canada described the scope of this exception in Sparling, *supra*:

*"Application of the benefit/burden exception does not result in subsuming the Crown under any and every regulatory scheme that happens to govern a particular state of affairs. Although some earlier authorities (see, e.g., Bank of Montreal v. Bay Bus Terminal (North Bay) Ltd. (1971), 24 D.L.R. (3d) 13 (Ont. H.C.), at p. 20, *aff'd* (1972), 30 D.L.R. (3d) 24 (Ont. C.A.)) had been thought by some to support the view that the Crown was bound by any regulatory scheme of sufficient scope, this approach was rejected by Laskin C.J. in the P.W.A. case (p. 69). The exception is not of such broad reach. Its application depends not upon the existence or breadth of a statutory scheme regulating an area of commerce or other activity, but, as noted earlier, upon the relationship or nexus between the benefit sought to be taken from a statutory or regulatory provision and the burdens attendant upon that benefit. The focus is not on the source of the rights and obligations but on their content, their interrelationship. ..."*

(pages 1027-1028; emphasis added)

No nexus has here been found, let alone a *close* nexus, between the scheme established by the *AECA* for controlling the production, applications and uses of nuclear power and the scheme established by the *Code* for regulating collective labour relations. Accordingly, it is not possible for the same reasons, to argue seriously in this context that there is any correlation between the two regulatory schemes based on which the benefit-burden doctrine could be applied.

Given this conclusion, we need not decide the merits of the union argument with respect to voluntary submission by Hydro-Québec to the *AECA*. The Attorney General for Quebec opposed this argument, contending rather that Hydro-Québec was bound by the *AECA* by necessary implication (see sections 8, 9 and 10 of the *AECA*, supra, which compel everyone to comply with the requirements of the scheme in order to be able to operate a nuclear station).

3. The Exception of Waiver by Virtue of Signing a Collective Agreement

This argument holds that the collective agreement between Hydro-Québec and the SPIHQ is valid within the meaning of the *Code* since, under that statute, a union does not need to be certified in order to be granted bargaining agent status. When it signed a collective agreement, the union acquired this status (Cable TV Limited and Emde Trucking Ltd., supra).

Certainly the *Code* gives a union that has not been certified bargaining agent status if it has entered into a collective agreement with the employer and that agreement is in force. Under the definition of "bargaining agent" in Part I of the *Code*, even if the provincial certification of a union is inoperative because it relates to an undertaking (or work) under federal jurisdiction, the collective agreement remains in effect since the *Code* permits a union that is not certified to enter into collective agreements with the employer (see Emde Trucking Ltd., supra, pages 80-81; and 16-17).

Since nuclear stations fall within federal jurisdiction, it would normally follow that the effect of the collective agreement between Hydro-Québec and the SPIHQ is to confer bargaining agent status on the SPIHQ under the *Code* with respect to employees working in the Gentilly II nuclear station, in order that the collective agreement could be found to be binding on the parties as if it had been signed by a bargaining agent certified under the *Code*. However, such a finding can be made only if the *Code* applies to Hydro-Québec, that is, once the immunity question is resolved.

In order to determine whether a Crown agent has waived its immunity, we must examine the agent's conduct, not ask whether the statute at issue would regulate the particular fact situation were there no issue of immunity. At this point, the provisions of the *Code* are of no assistance, since waiver is a question of fact that is assessed according to the holder of the immunity. Logically, the provisions of a statute cannot be used to determine whether there is an intention to make the holder subject to that statute, since submission presumes a voluntary, deliberate act by the Crown or its agent. The issue here is not to interpret a statute, but to interpret the intention of a party in respect of a contract. Accordingly, the answer to the question of whether, by entering into a collective agreement with the SPIHQ, Hydro-Québec has waived its immunity from the application of the *Code* depends solely on the conduct of Hydro-Québec and not on the provisions of the *Code*.

The record reveals that Hydro-Québec has never exhibited any intention to submit to the *Code*, nor has it acted in such a way as to become bound by the regulatory scheme instituted by the *Code*. On the other hand, while it appears that by signing collective agreements with the SPIHQ, Hydro-Québec did not at the same time waive its immunity from the application of the *Code*, this does not mean that these initiatives are of no consequence in terms of the application of the Quebec *Labour Code* to the engineers working at the Gentilly II nuclear station.

On this point, the Board notes that by entering into such collective agreements with the SPIHQ, Hydro-Québec has agreed in the past to submit to the scheme for the regulation of collective labour relations established by the Quebec *Labour Code*. Moreover, article 3.01 of the collective agreement between Hydro-Québec and the SPIHQ (union recognition) refers to the statutory certification granted on July 17, 1970 under the statutes of Quebec. Certainly Hydro-Québec entered into those agreements in the belief that it was bound by the statutory certification granted under section 21(6) of the Quebec *Labour Code*, which refers expressly to it. However, even

before this provision was introduced by the legislature of Quebec, Hydro-Québec had voluntarily recognized the bargaining agent that represented the engineers working for it, as the Quebec *Labour Code* at that time allowed for the concept of "recognized association" (see Ville de Montréal c. Syndicat professionnel des ingénieurs de la Ville de Montréal et de la Communauté urbaine de Montréal; and Syndicat professionnel des ingénieurs de l'Hydro-Québec c. Hydro-Québec, *supra*).

Even though the Gentilly II nuclear station was not in operation at that time (it was commissioned in 1982), this situation is worth noting since it confirms that Hydro-Québec, by considering itself to be thus bound by the Quebec scheme, could not at the same time have waived its immunity from the application of the *Canada Labour Code*.

And now what about the proposition that by entering into the collective agreement Hydro-Québec has become bound by the principle of the Crown's contractual liability, and that this principle prevails over the rights and prerogatives associated with Crown immunity? This proposition is said to find support in the following passage from the judgment of the Supreme Court of Canada written by Pratte J. in Bank of Montreal v. A.G. of Quebec, *supra*:

"The rules respecting the liability of the Crown therefore differ depending on whether the source of the obligation is contractual or legislative. The Crown is bound by a contractual obligation in the same manner as an individual, whereas as a general rule it is not bound by an obligation resulting from the law alone unless it is mentioned in it. This also means that subject possibly to a limited number of exceptions which would not apply here in any event, the rights and prerogatives of the Crown cannot be invoked to limit or alter the terms of a contract, which comprises not only what is expressly provided in it but also everything that normally results from it according to usage or the law."

(page 574; emphasis added)

With respect, this passage simply lays out the implications for the Crown of the source of the obligation, depending on whether it is contractual or legislative. The fact that Hydro-Québec is bound by the principle of contractual liability has in itself no impact on the question of whether it is subject to the *Canada Labour Code*. If neither the *Canada Labour Code* nor the *Quebec Labour Code* applies to Hydro-Québec, and the collective agreement it has entered into with the SPIHQ is a simple civil contract governed by the rules of the common law including the rules relating to agency, then the fact that the liability that may arise is liability to which immunity does not apply (the Crown is bound by a contractual obligation in the same way as is an individual, since it is subject to the common law, or *jus commune*, in this case the Civil Code of Quebec) can in no way change the determination in respect of the inapplicability of the *Canada Labour Code* to Hydro-Québec.

C. What is the Impact of the Dictum of La Forest J. in Ontario Hydro?

The Board is also of the opinion that Ontario Hydro is not conclusive with respect to the immunity issue. The passage which is relied on in support of this proposition, which is taken from the opinion of Mr. Justice La Forest (concurring in by L'Heureux-Dubé and Gonthier JJ., page 380), must be seen in relation to the issue in that case, and must not be interpreted outside the context in which it was written.

On this point, we concur in the view that this dictum simply states that the theory that federal statutes should be so interpreted as not to apply to corporations set up to advance a provincial purpose should be rejected, so that this theory cannot be used to ground the immunity of an agent of the provincial Crown from the application of federal statutes (on this point, see AGT no. 1, supra, page 275, expressly rejecting the theory that there is a doctrine of constitutional intergovernmental immunity).

In this case, Hydro-Québec's immunity is based not on that doctrine but on section 17 of the *Interpretation Act*, which applies to the provincial Crown. That provision

requires that Parliament clearly express its intention to bind the Crown, in the sense that when the relevant provisions of an enactment are placed in their context they must "mention" the Crown in a way that clearly conveys an intention to bind it (AGT no. 2, supra, pages 326, 328-329). In the context of Part I of the *Code* and its application provisions, Parliament has not clearly expressed the intention to bind agents of the provincial Crown (AGT no. 2, supra, page 330).

In our opinion, the Court's rejection of the "latter argument" is therefore simply a reference to Ontario Hydro's argument that federal statutes could not apply to corporations set up to advance a provincial purpose, and not, as the union argued, to the ancillary argument by the Attorney General for New Brunswick explained in the preceding sentence of the opinion of Mr. Justice La Forest.

In any event, the Board finds it hard to see how it could interpret the words of the learned judge in a manner that would be contrary to the meaning of his earlier statements. It may be recalled that Mr. Justice La Forest was one of the judges who signed the majority opinions in AGT no. 1 and AGT no. 2, supra. The interpretation of this passage advanced by the union runs counter to those decisions, and particularly to AGT no. 2, which deals with the question in the context of the *Code* and concludes that as an agent of the provincial Crown operating a federal undertaking, AGT was not subject to the *Code*.

If only for this one reason, we believe that the dictum of Mr. Justice La Forest cannot be interpreted as a clear and unequivocal assertion that the immunity of a provincial Crown agent does not apply to prevent application of the *Code*. In our view, where there is ambiguity, a judgment must be interpreted by attributing a meaning to it that assumes that the Court did not intend to decide *per incuriam*, that is, without knowledge of an earlier decision (on this point, see L.-P. Pigeon, Rédaction et interprétation des lois, supra, pages 101-102).

D. Conclusions

1. Crown Immunity

For the foregoing reasons, the Board concludes as follows:

(a) Hydro-Québec, as an agent of the Crown in right of Quebec, is not bound by the *Code* either by express terms or by necessary implication:

- The *Code* neither contains express terms nor discloses a clear intention to bind the provincial Crown which operates a nuclear station. The only conclusion supported by both a textual and a contextual or purposive analysis of the *Code* is that Parliament has not expressed any intention to bind the provincial Crown, apart from the case provided for in section 5.1 of the *Code*, which in no way affects Hydro-Québec;
- The interpretative tests developed by the Supreme Court of Canada for determining whether the legislator intended to bind the Crown do not admit an analysis of the purpose of any statute other than the statute at issue. Even if they did, an analysis of the *AECA* does not show that Parliament intended to subject the provincial Crown operating a nuclear station to the application of the *Code*.
- The purpose of the *Code* is not frustrated by the fact that the provincial Crown is not bound.

(b) Hydro-Québec has not lost its entitlement to immunity by virtue of its conduct:

- Hydro-Québec has not acted outside its mandate by entering into a federally regulated field.
 - Hydro-Québec has not waived its immunity from the application of the *Code* by being bound by the *AECA* scheme. There is no nexus between the *AECA* and the *Code*. Even if a nexus did exist, it would in no case be sufficiently close to warrant the application of the exception to immunity based on the benefit-burden doctrine.
 - Hydro-Québec has further not waived its immunity by entering into a collective agreement with the SPIHQ. Waiver is a question of fact that is assessed according to the holder of the immunity. Submission presumes a voluntary and deliberate act by the holder of the immunity, and the record reveals that Hydro-Québec never had the intention of submitting to the *Code*, nor did it act in such a way as to become bound by the regulatory scheme instituted by the *Code*.
- (c) Ontario Hydro is not conclusive with respect to the question of immunity at issue here:
- The Board is of the view that the excerpt relied on merely reiterates that there is no doctrine of constitutional intergovernmental immunity.

Accordingly, the Board finds that Hydro-Québec's argument must be accepted. It therefore upholds Hydro-Québec's objection and declares that it has no jurisdiction to hear the union's application for certification.

2. Regulatory Vacuum

This finding gives rise to a situation in which the engineers working in the Gentilly II nuclear station are in a regulatory vacuum in which neither the Quebec *Labour Code* nor the *Canada Labour Code* applies. The Board has encountered a similar situation in the past (see inter alia Canadian Advisory Counsel on the Status of Women, November 13, 1981 (LD 326); Canadian Forces Exchange System (CANEX); Government of the Northwest Territories and Housing Corporation of the Northwest Territories; and Royal Canadian Mounted Police, supra). As it noted in that last case:

"The Board has, on a number of occasions, had to acknowledge that it lacked jurisdiction to grant bargaining agent status to associations having the necessary support in an appropriate unit. In doing so, it left them bereft of a jurisdiction with authority to grant them collective bargaining rights ..."

(pages 41; and 61; citations omitted)

It will be for Parliament to find a solution to this regulatory vacuum problem which will best enable it "to fully meet the challenge of restoring employment as a central focus of government policy" (Notes for an address by The Honourable Lloyd Axworthy, Minister of Human Resources Development, "Creating Opportunity ... Through Social Security Reform", House of Commons, Ottawa, January 31, 1994, page 1).

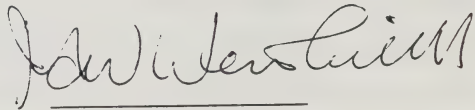
VIII
DISPOSITION

For all of the foregoing reasons, the Board:

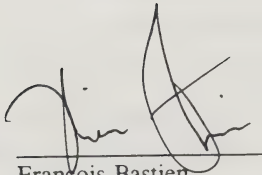
DECLARES that the Canada Labour Code does not bind Hydro-Québec, a corporation which is an agent of the Crown in right of Quebec;

and

DISMISSES the application for certification made by the SPIHQ since it has no jurisdiction to deal with it.



J.F.W. Weatherill
Chairman



François Bastien
Member



Véronique L. Marleau
Member

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Summary

Sheet Metal Workers' International Association, International Brotherhood of Electrical Workers, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and International Brotherhood of Boilermakers, Iron Ship Builders Blacksmiths, Forgers & Helpers, *complainants*, Canadian National Railway Company, *respondent*, and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), International Association of Machinists and Aerospace Workers, and AMF Technotransport Inc., *interested parties*.

Board File: 745-4646

National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), *complainant*, Canadian National Railway Company, *respondent*, and Sheet Metal Workers' International Association, International Brotherhood of Electrical Workers, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, International Association of Machinists and Aerospace Workers, and AMF Technotransport Inc., *interested parties*.

Board File: 745-4655

Résumé

Association internationale des travailleurs du métal en feuilles, Fraternité internationale des ouvriers en électricité, Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie des États-Unis et du Canada, et Fraternité internationale des chaudronniers, constructeurs de navires en fer, forgerons, forgeurs et aides, *plaignants*, Compagnie des chemins de fer nationaux du Canada, *intimée*, et Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada (TCA-Canada), Association internationale des machinistes et des travailleurs de l'aérospatiale, et AMF Technotransport Inc., *parties intéressées*.

Dossier du Conseil: 745-4646

Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada (TCA-Canada), *plaignant*, Compagnie des chemins de fer nationaux du Canada, *intimée*, et Association internationale des travailleurs du métal en feuilles, Fraternité internationale des ouvriers en électricité, Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie des États-Unis et du Canada, Fraternité internationale des chaudronniers, constructeurs de navires en fer, forgerons, forgeurs et aides, Association internationale des machinistes et des travailleurs de l'aérospatiale, et AMF Technotransport Inc., *parties intéressées*.

Dossier du Conseil: 745-4655



1081

CLRB/CCRT Decision no. 1081
September 14, 1994

CLRB/CCRT Décision n° 1081
le 14 septembre 1994

The complainant shopcraft unions allege that the Canadian National Railway Company (CNRC) breached section 94(1)(a) when it failed to provide sufficient notice of its decision to transfer its operations at the Pointe St-Charles shops to AMF Technotransport. The unions claim that the lack of notice and opportunity to address the consequences of CNRC's decision interfered with their representation of employees within the meaning of section 94(1)(a).

The Board determines that in providing insufficient notice of a transaction which so obviously raises difficult labour relations issues and significantly affects employment terms and conditions for a large number of bargaining unit employees, CNRC effectively side-stepped the statutory role of the unions that hold the exclusive right of representation. CNRC's failure to provide the shopcraft unions with an opportunity to address in a meaningful manner the consequences of a planned business decision affecting significant employment rights amounts to interference with the unions' right to represent employees under section 94(1)(a).

Les syndicats de métiers d'ateliers plaignants allèguent que la Compagnie des chemins de fer nationaux du Canada (CN) a enfreint l'alinéa 94(1)a lorsqu'elle ne les a pas avisés dans un délai suffisant de sa décision de transférer ses opérations des ateliers de Pointe St-Charles à AMF Technotransport. Selon les syndicats, l'insuffisance du délai et l'empêchement qu'elle représentait pour eux d'examiner les conséquences de la décision de CN constituaient de l'ingérence dans la représentation des employés au sens de l'alinéa 94(1)a.

Le Conseil estime qu'en avisant dans un délai insuffisant le syndicat d'une transaction qui soulève manifestement des questions complexes en matière de relations de travail et qui influe de façon importante sur les conditions d'emploi d'un grand nombre d'employés membres de l'unité de négociation, CN n'a effectivement pas tenu compte du rôle prévu par le Code de syndicats qui détiennent le droit exclusif de représentation. Le fait pour CN de ne pas avoir donné aux syndicats de métiers d'atelier la possibilité d'examiner soigneusement les conséquences d'une décision influant grandement sur les conditions d'emploi constituait de l'ingérence dans le droit de représentation des employés par les syndicats au sens de l'alinéa 94(1)a.

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MAINTENANT ACCESSIBLES DANS QUICKLAW.

In these circumstances, the Board allows the complaint and declares that the CNRC has breached section 94(1)(a) and remains seized of the matter for the purpose of determining whether any further relief may or should be granted.

Dans ces circonstances, le Conseil accueille la plainte et déclare que CN a enfreint l'alinéa 94(1)a). Il demeure saisi de l'affaire afin de décider si d'autres redressements pourraient ou devraient être accordés.

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Sheet Metal Workers' International Association, International Brotherhood of Electrical Workers, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and International Brotherhood of Boilermakers, Iron Ship Builders Blacksmiths, Forgers & Helpers,

complainants,

and

Canadian National Railway Company,

respondent,

and

National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), International Association of Machinists and Aerospace Workers, and AMF Technotransport Inc.,

interested parties.

Board File: 745-4646

National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada),

complainant,

and

Canadian National Railway Company,

respondent,

and

Sheet Metal Workers' International Association, International Brotherhood of Electrical Workers, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, International Association of Machinists and Aerospace Workers, and AMF Technotransport Inc.,

interested parties.

Board file: 745-4655
Decision no. 1081
September 14, 1994

The Board was composed of Mr. J.F.W. Weatherill, Chairman, as well as Mr. François Bastien and Ms. Sarah E. FitzGerald, Members. A hearing was held on April 25, 26 and 27, 1994, at Montréal.

Appearances

Mr. Steven H. Waller, for the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), the Sheet Metal Workers' International Association, the International Brotherhood of Electrical Workers, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the International Brotherhood of Boilermakers, Iron Ship Builders Blacksmiths, Forgers & Helpers;

Ms. Mary Gleason and Mr. John A. Coleman, for Canadian National Railway Company;

Mr. Jean Hurtubise, for the International Brotherhood of Electrical Workers; and Messrs. James L. Shields and Robert Guay, for the International Association of Machinists and Aerospace Workers.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman, and Ms. Sarah E. FitzGerald, Member.

I

The two complaints before the Board allege violation of section 94(1)(a) of the Canada Labour Code. That section prohibits, among other things, employer interference with the representation of employees by a trade union. The complaint in file no. 745-4655 was brought by the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), which at the time was bargaining agent for certain shopcraft employees of the respondent Canadian National Railway Company (CNRC). And the complaint in file no. 745-4646 was brought on behalf of the International Brotherhood of Electrical Workers (IBEW), the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the Plumbers & Pipefitters), and the International Brotherhood of Boilermakers, Iron Ship Builders Blacksmiths, Forgers & Helpers (the Boilermakers), which at the time represented certain other groups of shopcraft employees of CNRC. The complaints arose out of the same general situation, and were heard together. The International Association of Machinists and Aerospace Workers (IAM), another trade union representing CNRC shopcraft employees, did not file a complaint, but was considered an interested party, and made certain representations at the hearing into these matters.

After the hearing, but prior to this decision, CAW-Canada became the certified bargaining agent for a combined unit of shopcraft employees. The Board had determined the combined unit to be appropriate in prior proceedings.

II

At the hearing, the Board dealt with certain objections raised by the employer. At an early stage, the Board found that the complaints did indeed allege a prima facie case of violation of the Code. Later, the Board ruled that it would not grant an adjournment of the matter. The Board then made a ruling with respect to relief. The complainant unions had asked that the Board consider, in addition to a declaration that section 94(1)(a) was violated, other relief within the Board's discretion such as an order requiring CNRC to deal with the bargaining agent on certain matters arising from CNRC's transfer of operations (described below) to AMF Technotransport Inc. (AMF Technotransport). CNRC maintained that the relief sought had been limited to a declaration that the Code had been violated. After hearing submissions, the Board stated during the hearing:

"The relief asked, in our view, is within the scope of the complaints. Mr. Waller did indicate in argument yesterday that it was far from academic for the Board to issue a declaration that there had been a violation of section 94(1)(a) of the Code. That was in answer to one of a number of arguments raised by Mr. Coleman and cannot be said to be a renunciation of other claims for relief."

The Board added in its ruling:

"The situation obtaining at the end of the day may well affect and perhaps limit any relief which might be awarded should the allegations be made out."

That was not a statement to the effect that the Board would hear these cases having in mind the sole possibility, if the allegations were found to have merit, of declaratory relief, in the form of a bare statement that there had been a violation of section 94(1)(a). Certainly it is true that we cannot in these particular cases make any findings or issue any declaratory relief that would be binding on AMF Technotransport, which is not a party in these proceedings.

CNRC asks the Board to reconsider its decision dealing with the relief should the complaints be found to have merit. Having reviewed the written submissions on this point, provided to the Board after the hearing, it is our view that no grounds for such reconsideration exist. To the extent there has been any misunderstanding between counsel, there is another forum for settlement of that dispute. In view of the determination we make in this case, the matter may prove to be of academic interest only, although in the event further relief is requested, the Board would hear the parties in that respect.

III

The essential facts are not in dispute. The following statement of facts is made for the purpose of the present proceedings only. On August 27, 1993, CNRC was by order-in-council authorized to incorporate a wholly owned subsidiary "AMF Technotransport Inc." CNRC did so on August 30, 1993. Effective September 1, 1993 CNRC transferred its property at Montréal known as the Pointe St-Charles shops, together with the business conducted there, to the newly incorporated AMF Technotransport. CNRC telephoned the System General Chairmen the day before, August 31, 1993, to advise that it would announce the transaction the following day. Reading from a prepared transcript, CNRC advised each shopcraft union:

"Tomorrow morning, September 1, CNRC will announce that effective tomorrow, AMF will become a wholly owned subsidiary of CNRC and will become known as AMF Technotransport Inc.

We understand that your members will be advised by AMF tomorrow morning at 10:00 hours. The sale of business will include the transfer of existing employees to Technotransport, and Technotransport will also honour the terms and conditions of the collective agreements which are in place as well as the terms and conditions of employment which are in place for the five shopcraft unions.

As soon as we have further information on this subject, we will forward it to you, hopefully sometime tomorrow. Should you so desire, we are prepared to arrange a meeting with you to further discuss this matter. "

At the time of the September 1, 1993 transfer to AMF Technotransport, the CAW-Canada/CNRC collective agreement was still in effect. The collective agreements of the other five shopcraft unions had, however, expired. Following a period of negotiations and conciliation, CNRC imposed in June 1993 modified work terms and conditions for employees represented by the five unions. The modified terms did not include access to an arbitration procedure. CAW-Canada filed a grievance with CNRC, claiming among other things that an Article 8 notice of Technological, Operational or Organizational change was required, and that the transferred employees were entitled to exercise CNRC employment options associated with such changes. This grievance was by agreement put on hold, until the bargaining agent for the combined shopcraft unit was determined by representation vote. The other complainant shopcraft unions also filed grievances but, because of the modified work terms and conditions, are apparently unable to advance them to arbitration.

IV

For many years CNRC carried out railway car and locomotive repair and rebuilding at the Pointe St-Charles shops, traditionally an important part of its railway operations. In recent years, it also performed a significant amount of contract work for other users of heavy motive power or related equipment. This work was conducted by CNRC primarily under the name of the "AMF Division". It appears that AMF Technotransport is carrying on, at Pointe St-Charles, essentially the same operations as CNRC itself carried on there, although the proportion of contract work may have increased.

CNRC describes its transaction with AMF Technotransport as a sale of business. Whether the transaction constitutes a sale under the Code has been in issue in other proceedings. The Board finds it sufficient and appropriate for purposes of this decision to recognize the transaction, at least, as a transfer of operations and an alleged transfer of employees.

Although AMF Technotransport has from the outset taken the position that the operations now carried on at the Pointe St-Charles shops fall within provincial jurisdiction, CNRC's position was, at the time of the September 1 transfer and in the weeks following, less clear. It is sufficient for our purposes to note that CNRC was either unsure of or unwilling to state its position on the jurisdictional question. That question had been raised before this Board in other proceedings, and before the courts. The Board adjourned its consideration of that issue, pending a decision of the Quebec Superior Court, before which the matter was argued. The Board was recently advised that the Quebec Superior Court determined that AMF Technotransport falls within provincial jurisdiction with respect to labour relations.

For the purposes of these complaints, we find it matters not whether the newly established AMF Technotransport is carrying out a provincial work or undertaking, whether or not a sale of business has occurred, or whether or not CNRC and AMF Technotransport are said to be a "common employer". The thrust of the shopcraft unions' complaint concerns insufficient notice of the transfer to AMF Technotransport, and thus the loss of opportunity as bargaining agent to address with CNRC matters of employment rights and status for those affected by the transfer. Several hundred employees and an entire CNRC shop operation were affected by the September 1, 1993 transfer, leaving the shopcraft unions scrambling to gather information after the fact. According to the unions, the lack of notice and opportunity to address the consequences of these business decisions interfered with their representation of employees within the meaning of section 94(1)(a) of the Code. The unions assert further that CNRC's "past practice" in shop closures, or a sale of a

CNRC division, has been to give early notice and negotiate transfer agreements for affected employees.

What is of crucial significance is that the shopcraft employees employed at the Pointe St-Charles shops immediately prior to the transfer of operations to AMF Technotransport were employees of CNRC, and that CNRC takes the position that the effect of the transfer was to end all CNRC's obligations towards these employees. CNRC's decision to incorporate and transfer the Pointe St-Charles shops to AMF Technotransport raised obvious and complicated labour relations issues. This is particularly so, given CNRC's position on the nature and effect of the transaction, i.e., that the transferred workers are no longer CNRC employees, that they cannot exercise seniority to other CNRC locations in the St. Lawrence Region, that an Article 8 change notice was not required, and CNRC's seeming uncertainty whether, for labour relations purposes, AMF Technotransport comes under provincial jurisdiction. In response to CAW-Canada's inquiries about collective agreement and seniority rights at CNRC for transferred employees, CNRC answered only that AMF Technotransport agreed to honour terms and conditions of CAW-Canada's collective agreement with CNRC, including the Employment Security and Income Maintenance Agreement. However, CNRC would not permit remaining CNRC employees to exercise their seniority to AMF Technotransport, and it appears no Pointe St-Charles bargaining unit employees were permitted to exercise their seniority to other CNRC locations in the St. Lawrence Region. It is obvious that the shopcraft unions, in their attempts and duty to represent bargaining unit employees, would question the nature and effect of such a significant transaction. Yet, CNRC chose not to address in advance with the unions its plans and its position concerning the consequences for employees.

We do not find it necessary to determine whether the transferred workers remain CNRC "employees" or what employment options they may exercise in the circumstances. These issues are more appropriately determined in other proceedings. Certainly both CNRC and AMF Technotransport appear to treat the workers who have

continued to work at the Pointe St-Charles shops as AMF Technotransport employees. However, there is no evidence before us of any specific act of hiring any of these persons by AMF Technotransport. It was agreed for the purpose of these proceedings that CNRC has taken no steps (apart from the September 1, 1993 sale agreement with its subsidiary AMF Technotransport) to terminate the employment of the employees in question. Further, and this was also agreed, the employees CNRC says it has transferred to AMF Technotransport have taken no steps to sever their employment with CNRC. CNRC could not help but know the unions would have legitimate concerns and wish to consult in respect of the dramatic impact of the AMF Technotransport transfer on the exercise of seniority rights for hundreds of workers.

When asked by the unions following the September 1 transfer, CNRC did provide details concerning the AMF Technotransport incorporation and transfer of operations. CNRC also subsequently met with CAW-Canada at the latter's request, but without result, to discuss terms to apply to the transferred workers. In respect of the other shopcraft unions, neither CNRC nor the other unions sought out such discussions.

The operation of CNRC's AMF Division was the subject of discussions in the round of railway bargaining well before the September 1, 1993 transfer. CNRC sought, without success, to obtain modified work terms for the Pointe St-Charles shops. In November 1992, the Council of Railway Unions, then representing and negotiating for a certain group of shopcraft unions, expressed concern about rumours that CNRC might separate the AMF Division from CNRC. In its December 1992 response, CNRC stated that the structure and operation of the AMF Technotransport facility was under examination, but that no decision had been taken. The Council wrote again on August 23, 1993 to express its continued concern about the rumours, and to request an update on any plans to change AMF Technotransport's status. A week later, on August 31, 1993, the complainant shopcraft unions received their phone calls advising that the AMF Tecnotransport transaction would be announced the following day.

V

Quite aside from the unions' claim concerning CNRC's past practice in giving notice and negotiating transfer agreements, and whether or not the requirement of an Article 8 change notice is eventually established, the Board finds in these circumstances that CNRC's conduct violates section 94(1)(a) of the Code.

In providing insufficient notice of a transaction which so obviously raises difficult labour relations issues and significantly affects employment terms and conditions for a large number of bargaining unit employees, CNRC effectively side-stepped the statutory role of the unions that hold the exclusive right of representation. The unions were denied an opportunity and the ability to explore in a rational, ordered manner any number of questions concerning employee status and rights and their own right of representation, questions that inevitably arise from a decision of such dramatic consequences given CNRC's position on the matter. Consequently, the unions were further denied the ability to deal credibly and advisedly with affected bargaining unit employees. The Board was advised of the flood of calls to the unions from concerned employees in the days following the announcement, and the "J'y reste" button-wearing campaign by workers at the Pointe St-Charles shops. Also in evidence were the many grievances individuals and unions attempted to file first with CNRC, and then for some, under dispute, with AMF Technotransport. During this time, the unions were gathering details of the transaction and CNRC's position on its nature and consequences, in the form of question and answer correspondence.

That CNRC should deny the unions this opportunity amounts in these circumstances, in our view, to undermining the union's statutory authority and obligation to represent employees. The Code does not specify every obligation or right of employers, employees and their bargaining agents. Section 94(1)(a) is worded in a general, purposive manner, and the Board must apply this general wording to the endless variety of circumstances that may arise.

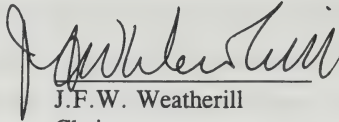
CNRC suggested it was under no obligation to discuss the AMF Technotransport transfer because of the status of the collective agreements. With respect we do not agree. Nor is the question in our mind one of whether we can or should allow the matter to be resolved simply through arbitration for those unions having access to such procedure, with those that do not because of economic pressure being denied that option. Regardless of the outcome of the issues of the Article 8 change notice and what employment options may exist for the transferred workers, we are convinced that CNRC's conduct undermines the intent of the Code, in that it side-steps that union's statutory role. The Code encourages healthy, stable bargaining relationships. To achieve this end, a party's role should not be undermined to such an extent that it is left with no meaningful capacity to represent its constituents in employment matters of vital concern to them (Canada Post Corporation (1985), 63 di 136 (CLRB no. 544), at pages 162-163).

The Board previously concluded it was not necessary in a complaint of this type under section 94(1)(a) that the Board find that anti-union animus affected CNRC's decision to make the transfer (Canadian Broadcasting Corporation (1990), 83 di 102 (CLRB no. 839), at page 131, and Maritime Employers' Association (1985), 63 di 69 (CLRB no. 540), at pages 86-87). The Board makes no such determination. Rather, we are satisfied that circumstances may exist, as they did here, that make an employer's failure to provide to its unions an opportunity to address in a meaningful manner the consequences of a planned business decision affecting significant employment rights, an interference with the union's right to represent employees under section 94(1)(a).

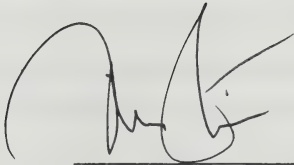
VI

For the foregoing reasons, we find the complaints have merit. In view of the ruling on the remedy made at the hearing as set out above, we consider the appropriate relief to be a declaration. We therefore declare that the respondent CNRC has violated

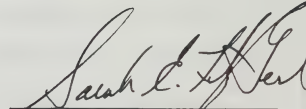
section 94(1)(a) in the manner described. The Board remains seized of the matter for the purpose of determining whether any further relief may or should be granted.



J.F.W. Weatherill
Chairman



François Bastien
Member



Sarah E. FitzGerald
Member

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Summary

Eugene Kalwa, *applicant/complainant*,
Society of Ontario Hydro Professional and
Administrative Employees, *respondent*, and
Ontario Hydro, *respondent*.

Board Files: 570-11;
745-4750/4754/4849

CLRB/CCRT Decision no. 1082
September 22, 1994

Résumé

Eugene Kalwa, *plaignant/requérant*, Société
des employés professionnels et administratifs
de l'Hydro-Ontario, *intimée*, et Ontario
Hydro, *intimée*.

Dossiers du Conseil: 570-11;
745-4750/4754/4849

CLRB/CCRT Décision n° 1082
le 22 septembre 1994

The Board confirms the rulings made at the
hearing into these matters and further
decides:

(1) to adjourn sine die the complaints
pursuant to sections 37 and 94(3) of the
Canada Labour Code (Part I - Industrial
Relations) pending the outcome of the
grievance proceedings;

(2) to dismiss the application purporting to
be based on section 25 of the Code
(employer domination) as the allegations
made by the applicant are untimely; and

(3) to dismiss the application pursuant to
section 40 of the Code alleging that the
union had fraudulently obtained certification.
The Board is of the view that the allegations
relate to the quality of the respondent as a
trade union and not to particular actions or
representations by which it might
improperly have obtained certification from
the Board.

Le Conseil confirme les décisions rendues à
l'audience concernant les questions en cause
et rend aussi les décisions suivantes:

(1) il ajourne pour un temps indéfini
l'examen des plaintes fondées sur l'article
37 et sur le paragraphe 94(3) du Code
canadien du travail (Partie I - Relations du
travail) en attendant la décision concernant
les griefs;

(2) il rejette la demande censément fondée
sur l'article 25 du Code (domination par
l'employeur) puisque les allégations du
requérant ne sont pas admissibles;

(3) il rejette la demande fondée sur l'article
40 du Code alléguant que le syndicat avait
obtenu frauduleusement son accréditation.
Le Conseil est d'avis que les allégations ont
trait au statut d'intimé du syndicat et non à
certaines mesures et observations par
lesquelles l'intimé aurait obtenu de façon
malhonnête l'accréditation du Conseil.



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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Eugene Kalwa,

applicant/complainant,

and

The Society of Ontario Hydro Professional and Administrative Employees,

respondent,

and

Ontario Hydro,

respondent.

Board Files: 570-11,
745-4750/4754/4849
CLRB/CCRT Decision no. 1082
September 22, 1994

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Calvin B. Davis and Michael Eayrs, Members. A hearing was held on August 30, 1994, at the Federal Court premises in Toronto.

Appearances

Dr. Eugene Kalwa, on his own behalf;

Messrs. James K.A. Hayes and David W.T. Matheson accompanied by Jeff Berg, Staff Officer, for the Society; and

Mr. David Akande, accompanied by Ms. Mary Jan Lyle, Human Resources, Consultant/Employment Equity Advisor, for Ontario Hydro.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

At the hearing of these matters, the Board heard the parties with respect to a number of preliminary matters. After taking time for consideration, the Board made the following ruling.

I

"We have considered the preliminary matters that were raised so far in these cases, and while we do not now make any final disposition of any of them, we conclude that further deliberation is needed before these cases continue.

"First, with respect to the alleged violation of section 37 of the Code, the Board reserves its decision on the question whether or not it has jurisdiction to consider these matters in the circumstances. It may be that a decision in that regard will be issued shortly. In any event, the Board is of the view that these cases, each of which involves matters that are the subject of a form of grievance proceedings, should await the outcome of such procedures.

"Second, with respect to the alleged violation of section 25 of the Code, that section belongs to a group of sections dealing with "acquisition and termination of bargaining rights". The Board will analyse the allegations made to determine whether or not a prima facie case has been alleged and whether, if so, it has been alleged in a timely fashion. We reserve our decision on that point.

"Third, with respect to the alleged violation of section 40 of the Code, we take under advisement our decision as to whether or not the allegations made are such that, if proved, they would establish a violation of that provision.

"Fourth, and finally, with respect to the complaints of violation of section 94(3) of the Code, essentially allegations of retaliation for the exercise of rights under the Code, we have no doubt that these complaints are properly

before the Board. Pursuant to section 98 of the Code, the written complaints are themselves evidence that failures to comply with section 94(3) actually occurred, and the burden of proof to show that such failures did not occur is on the employer. We would, therefore, call upon the employer to proceed with evidence in that regard. Having regard to the fact that most, if not all, of the circumstances that gave rise to the complaints are the subject of grievance proceedings, we consider that it is in the best interests of labour relations that those proceedings be given a chance to succeed. We will, therefore, adjourn this matter, subject to the proviso that it will be open to the complainant, Dr. Kalwa, or to the employer, Ontario Hydro, to request, following a delay of 60 days from this date, that a hearing date be set. We will do our best to have issued decisions relating to some of the other aspects of these matters by that time."

II

We now confirm those rulings, and further thereto make the following decisions and further rulings in these several matters.

First, with respect to the complaint pursuant to section 37 of the Code, the Board does not find it necessary at this time to decide the question relating to its jurisdiction, that is, to determine whether or not there was a collective agreement in existence at the material times. The application is, in our view, premature in the sense that there are grievance proceedings under way with respect to the subjects of complaint. In our view, further consideration of this matter should await the outcome - or in any event, the pursuance within a reasonable period of time - of those matters. This application is accordingly adjourned sine die.

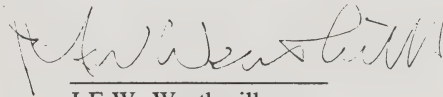
Second, section 25 of the Code provides that the Board shall not certify a trade union as bargaining agent for a unit of employees where it is satisfied that the union is so dominated or influenced by the employer that its fitness to represent employees of the

employer for purposes of collective bargaining is impaired. This provision is directed to the certification process set out in sections 24 to 26 of the Code. While the applicant sought leave to intervene in the certification proceedings that resulted in the respondent trade union being certified as bargaining agent for a unit of employees which includes the applicant, leave to intervene was refused. The allegations now made by the intervenor in respect of the certification application are not timely and would not come within the scope of the Board's policy relating to the reconsideration of decisions, being indeed out of time in that respect as well. Accordingly, the application purportedly based on section 25 of the Code is dismissed.

Third, section 40 of the Code provides that where a trade union has been certified as bargaining agent for a bargaining unit, any employee in the unit who alleges that the certification was fraudulently obtained by the trade union so certified may apply to the Board, at any time, for revocation of the certification. This application is, in form at least, properly before the Board. In our view, however, the specific allegations concerning the trade union fraudulently obtaining certification would not, if proved, support the conclusion that such fraud had occurred. Most of the allegations relate to complaints that the applicant filed concerning the trade union's representation of him in various employment matters. The allegations relate to the quality of the respondent as a trade union, and not to particular actions or representations by which it might improperly have obtained certification from this Board. Thus the allegations, if established, would not make out a case of violation of section 40 of the Code, and the application in this respect is accordingly dismissed.

Fourth, as we indicated in the ruling given at the hearing, the complainant alleges violation by the employer of section 94(3) of the Code, claiming in particular that the

respondent employer took certain retaliatory measures against him because of his participation in proceedings under Part I of the Code. Certainly if such allegations were proved, a violation of the Code would be found to have occurred. As we indicated in our ruling at the hearing, by section 98(4) of the Code the burden of proof of showing that the alleged failure to comply with the Code did not occur is on the employer in the circumstances of this case. It continues to be our view, however, that since most of the allegations relating to the alleged violation of section 94(3) are also the subject of grievance proceedings, it is in the best interests of labour relations that these proceedings be given a chance to succeed. The proceedings in respect of this complaint, therefore, remain adjourned sine die subject to the proviso set out in the above ruling.



J.F.W. Weatherill
Chairman



Calvin B. Davis
Member



Michael Eayrs
Member

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Summary

Brink's Canada Limited, *applicant*, and Independent Canadian Transit Union, Local No. 1, *respondent*.

Board File: 725-350
CLRB/CCRT Decision no. 1083
October 12, 1994

Brink's Canada Limited brought an application pursuant to section 91 of the Canada Labour Code seeking a declaration that the respondent union engaged in an illegal strike in violation of section 89 of the Code.

In earlier applications before the Board, the respondent union had successfully replaced another union as the bargaining agent representative for the unit of employees certified by the Board. Prior to the successful raid application, the preceding union, the IWA, had negotiated two separate collective agreements within that single bargaining unit.

The argument surrounding the legality of the job action taken by the union membership in the present application hinged upon whether or not there could be two collective agreements in force and effect for a single bargaining unit.

Résumé

Brink's Canada Limited, *requérant*, et Syndicat canadien indépendant du transport, section locale 1, *intimé*.

Dossier du Conseil: 725-350
CLRB/CCRT Décision n° 1083
le 12 octobre 1994

Brink's Canada Limited demande au Conseil de déclarer, aux termes de l'article 91 du Code canadien du travail, que le syndicat intimé a violé l'article 89 du Code en déclenchant une grève illégale.

Dans le cadre de demandes antérieures devant le Conseil, le syndicat intimé avait supplanté un autre syndicat à titre d'agent négociateur d'une unité d'employés accréditée par le Conseil. Avant ce maraudage, le syndicat précédant, le Syndicat international des travailleurs du bois d'Amérique, avait négocié deux conventions collectives distinctes à l'égard de cette unité de négociation.

En ce qui concerne le caractère légal des mesures prises par les membres du syndicat, les parties dans cette affaire ont surtout fait porter leurs arguments sur la question de savoir si deux conventions collectives pouvaient s'appliquer à une seule unité de négociation.



The Board, reiterating the position taken by it in previous decisions, held that in the circumstances there could be only one valid existing collective agreement in place for a single bargaining unit, pursuant to the provisions of the Code.

The Board concluded that the union, having given the appropriate notice to bargain, and having fulfilled the requirements of section 89(1)(a)-(d), acquired the legal right to strike for the entire bargaining unit.

Le Conseil, répétant la position qu'il avait adoptée dans des décisions antérieures, affirme que dans les circonstances, il ne peut exister qu'une seule convention collective valide pour une seule unité de négociation aux termes des dispositions du Code.

Le Conseil en est arrivé à la conclusion que le syndicat, ayant signifié l'avis de négociation approprié, et ayant rempli les obligations prévues aux alinéas 89(1)a) à d) du Code, avait acquis le droit de faire la grève pour l'ensemble de l'unité de négociation.

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MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Brink's Canada Limited,

applicant,

and

Independent Canadian Transit Union,
Local No. 1,

respondent.

Board File: 725-350
CLRB/CCRT Decision no. 1083
October 12, 1994

The Board was composed of Mr. Richard I. Hornung, Vice-Chair; Ms. Suzanne Handman, Vice-Chair; and Mr. Calvin B. Davis, Member.

Appearances

Mr. Gregory J. Heywood for the applicant; and

Ms. Gina Fiorillo for the respondent.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

On August 16, 1994, the Board heard an application filed by Brink's Canada Limited pursuant to section 91(1) of the Canada Labour Code which sought a declaration that the respondent union engaged in an illegal strike in violation of section 89(1) of the Code as well as an order enjoining the employees from participating in the alleged illegal strike.

On August 17th, the Board dismissed the employer's application and advised the parties of its intention to issue reasons for its decision at a later date. These are the reasons.

II

The facts of the case are not in dispute and are easily gleaned both from the Board's earlier decisions involving these parties (see Brink's Canada Limited (1993), 91 di 175 (CLRB no. 1005); and Brink's Canada Limited (1994), as yet unreported Board decision no. 1053) and the agreed statement of facts contained in the employer's application and the union's reply. They are essentially as follows:

Brink's is an armoured carrier with branches in Victoria, Vancouver, Kelowna and Kamloops.

On March 30, 1992, the IWA-Canada Local 1-217 was certified as the bargaining agent for the following unit:

"all employees of Brink's Canada Limited employed in British Columbia, excluding office and sales staff and those above"

Thereafter, Brink's and the IWA entered into two separate collective agreements with respect to this single bargaining unit. The term of the agreement for the employer's operations in Vancouver and Victoria, British Columbia (the "Vancouver/Victoria agreement") came into effect on February 1, 1990 and expired on January 31, 1993. The term of the agreement for the employer's operations in Kelowna and Kamloops, British Columbia (the "Kelowna/Kamloops agreement") came into effect on November 1, 1991 and expires on November 8, 1994. Each of the agreements has a clause which provides that they shall continue in full force and effect until a legal strike or

lockout or until the renewal or revision of the collective agreement or a new collective agreement has been reached.

On April 8, 1993, as a result of a raid application by the Independent Canadian Transit Union (ICTU), the IWA was replaced as the certified bargaining agent for all Brink's employees in the unit described above. Consequently, when the Board certified ICTU as the bargaining agent for the province wide unit, that single bargaining unit was subject to two collective agreements negotiated by the employer and IWA, the displaced union. In granting certification to the union in Brink's Canada Limited (1005), supra, the Board concluded:

"In our view, the existence of two collective agreements, with different termination dates, purporting to represent employees in a single Board-certified unit is inconsistent with the terms of section 24(2) of the Code and, therefore, ineffectual vis-à-vis the time limitations contained therein. Section 24(2)(c) provides that the time limitations apply 'where a collective agreement applicable to the unit is in force'.

In the present case, neither of the collective agreements entered into between the employer and the intervenor is, in the language of the statute, 'applicable to the unit'. ..."

(pages 178-179)

By letter of June 14, 1993, the union provided notice to the employer of its intention to commence negotiations with the view of entering into one collective agreement for the entire bargaining unit.

The union's proposals were rejected by the employer and on June 22, 1993, the employer wrote to the Minister requesting conciliation pursuant to sections 71 and 72 of the Code.

Following receipt of the report of the Conciliation Officer, the parties received written notification, on November 29, 1993, of the Minister's refusal to appoint a conciliation board, pursuant to section 74(c) of the Code.

On October 14, 1993, while awaiting the report of the Conciliation Officer, the union made an application for Ministerial consent to proceed with a complaint of bad faith bargaining against the employer. Consent was granted on December 7, 1993.

A hearing was held regarding the bad faith bargaining allegations on April 5 and 6, 1994. In its decision (Brink's Canada Limited (1053), supra), the Board reiterated its earlier determination regarding the validity of the two collective agreements:

"In the present case, neither of the collective agreements entered into between the employer and the intervenor is, in the language of the statute, 'applicable to the unit'. ..."

(Brink's Canada Limited (1005), supra, page 179, reproduced in Brink's Canada Limited (1053), supra, page 3)

and ordered as follows:

- "1. that the employer, or its authorized representative on its behalf, immediately meet with the union and commence to bargain collectively in good faith; and*
- 2. that the employer make every reasonable effort to enter into a collective agreement that will apply to the entire bargaining unit certified by the Board.*

The Board further declares:

- 3. for the purposes of section 50(b) of the Code, the terms and conditions of employment provided in the collective agreements for Vancouver-Victoria and Kelowna-Kamloops apply to the employees presently affected by those agreements; and*

4. *the notice to bargain given by the union on June 14, 1993 constitutes a valid notice to bargain with respect to the bargaining unit as a whole and that the said notice constitutes compliance with section 50 of the Code."*

(Brink's Canada Limited (1053), supra, page 4)

On April 26, 1994 the union requested that the parties again be placed in conciliation while they attempted to negotiate a collective agreement. That request was denied by the Federal Mediation and Conciliation Service office.

III

At the commencement of the hearing, the parties agreed that there were two issues for the Board to decide:

1. Had the union and employer acquired the legal right to strike or lockout;
2. If the answer to the above question was negative, does the action taken by Brink's employees constitute a strike within the meaning of the Code, or was there in fact a lockout.

It was agreed that if the Board answered the first question in the affirmative, there was no need for it to make a determination on the second issue.

IV

The employer's argument was essentially premised on the existence of two separate collective agreements for Kamloops/Kelowna and Vancouver/Victoria. It argued that although the right to strike or lockout had been acquired with respect to the employees covered by the collective agreement for Victoria/Vancouver, insofar as the term of that agreement had expired, the same right had not accrued to the employees in the

Kamloops/Kelowna area, insofar as that "collective agreement" does not expire until November 1994.

The employer contends that failure to give effect to the termination date in the Kamloops/Kelowna agreement would be tantamount to the Board ordering the termination of that collective agreement. It asserts that the Board does not have jurisdiction to terminate a valid and binding collective agreement. This assertion may well be true, but that is not the issue before us in the present application. The critical issue for the Board to determine is whether the two collective agreements in question are **valid**, that is, in conformity with the provisions of the Code, and therefore enforceable in the context of the present application.

The termination of a collective agreement is an entirely different issue from that of its validity. Termination of a collective agreement implies that it was valid at the time of its conclusion. Such is not the case here. In decisions no. 1005 and 1053, the Board did not purport to terminate either of the collective agreements. Rather, it determined that neither collective agreement met the requirements of the Code and both were consequently invalid. The rationale provided by the Board for its determination in those decisions is further supported by the specific language of section 56 of the Code. It provides that:

"56. A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this Part, binding on the bargaining agent, every employee in the bargaining unit and the employer."

(emphasis added)

In addition to the self evident language of section 56, it is apparent from a general review of the provisions of the Code - without detailing the same - that it envisions a single collective agreement applicable to all employees in the unit.

In order to be valid, effective and in compliance with the provisions of the Code, a collective agreement must bind **every** employee in the bargaining unit. With the rare exception of bargaining unit reviews and consolidations - where a newly consolidated unit might be subject to more than one agreement until a new single agreement is reached - there simply cannot be more than one valid collective agreement for a single bargaining unit. Since, in the present case, there was no single collective agreement which applied to **all of the employees** in the unit, there was no valid collective agreement which meets the requirements of the Code.

In its decision in Brink's Canada Limited (1005), *supra*, the Board concluded:

"In the present case, neither of the collective agreements entered into between the employer and the intervenor is, in the language of the statute, 'applicable to the unit'. The Code clearly specifies the unit for which a collective agreement must have been concluded before the shield of timeliness, provided in section 24(2)(c), can be raised against a subsequent certification application. In order to avail itself of the protection provided by those time limitations, the respondent must show at a minimum that its collective agreement covers all the members of the unit for which it was certified (see Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRB no. 383)). In the circumstances no such agreement is in force, and the intervenor cannot, therefore, invoke the provisions of section 24(2)(c) in an effort to defeat the present application."

(page 179)

Similarly, the employer cannot now invoke the termination date of an invalid collective bargaining agreement, to support an application under section 91. Even though the parties who originally negotiated the agreement conducted their labour relations pursuant to its terms, an invalid agreement cannot be used as either a sword or a shield when parties attempt to invoke the provisions of the Code.

To grant the employer's application would essentially recognize that two separate and distinct collective agreements are in fact in effect for the single bargaining unit. Such a conclusion would not only be contradictory to that already reached in decisions 1005 and 1053 but also inimical both to accepted labour relations jurisprudence and the provisions of the Code.

In Hémond v. Coopérative Fédérée du Québec, [1989] 2 S.C.R. 962, the Supreme Court made the following observation regarding a duplicity of collective agreements in a single unit:

"If one were to conclude that the problem raised by respondents is one of applicability (and that the Superior Court thus has jurisdiction) this would mean that more than one collective agreement applies to the same bargaining unit. That would imply that a collective agreement which had otherwise expired would regulate the method used to calculate the seniority of certain employees (here respondents), while the text of the most recent collective agreement would regulate that of certain other employees. This would amount to saying that a collective agreement can be divided and may not govern certain members of a bargaining unit. In light of the legislation and fundamental principles in the field of labour law, this in my opinion would be an untenable conclusion."

(page 972; emphasis added).

Although this judgement was rendered in applying the Quebec Labour Code, we are of the view that the same principles apply, given the terms of section 56, in the present context. Frankly, it would make no industrial relations sense for two collective agreements to be deemed effective for a single bargaining unit, thereby permitting one half of the employees in the unit to be legally on strike, while the other half would otherwise be prohibited from taking job action. The consequences, from an industrial stability perspective are self evident.

V

Although the collective agreements themselves do not meet the requirements of the Code, the terms and conditions contained therein remain significant for collective bargaining purposes. There is a considerable difference between a collective agreement being in effect and the terms and conditions of employment contained therein being continued until a new or revised agreement is concluded or the right to strike or lockout is acquired; this distinction is alluded to in Aéroports de Montréal (1993), 21 CLRBR (2d) 289; and 94 CLLC 16,029 (CLRB no. 1038).

As the Board stated in Brink's Canada Limited (1053), supra, it is the terms and conditions of employment that are to continue in effect until a new agreement is concluded:

"...For the purposes of section 50(b) of the Code, the terms and conditions of employment provided in the collective agreements for Vancouver/Victoria and Kelowna/Kamloops apply to the employees presently affected by those agreements. ..."

(page 4)

Contrary to the argument of the employer, the above quote cannot be interpreted to mean that both collective agreements are valid and **in effect** until their termination dates. The language contained in the Board's order in Brink's Canada Limited (1053), supra was intended to give effect to the labour relations reality that exists between the parties and should not be taken to suggest that the Board was thereby lending legal effect to the termination date of an invalid agreement.

For practical purposes - to achieve some modicum of labour relations stability while bargaining proceeded - the Board directed that, in these peculiar circumstances, the terms and conditions of the two agreements would continue to apply for the regions described, notwithstanding their specific invalidity with respect to the unit as a whole,

only until such time as a revised or new collective agreement had been concluded for the entire unit or the right to strike or lockout had been acquired.

The Board's reference to section 50(b) of the Code underscores the fact that the Board's order is to be interpreted as a direction that until an appropriate collective agreement is entered into for the **entire** bargaining unit, the terms and conditions of the respective collective agreements would continue to apply, pursuant to that section, until "... the requirements of paragraphs 89(1)(a) to (d) have been met,...".

VI

Where the appropriate notice to bargain is given pursuant to section 48, the provisions of section 50 require the parties to meet and commence bargaining and to make every reasonable effort to enter into a collective agreement. Once negotiations have taken place, pursuant to section 50(a), and the provisions of section 89(1)(a) to (d) have been met, the parties acquire the right to strike or lockout.

Notwithstanding the fact that the union's notice to bargain of June 14, 1993 specifically refers to section 36(2) of the Code, it effectively constituted, in the circumstances of this case, a notice to bargain a valid collective agreement for the entire bargaining unit pursuant to section 48, which provides:

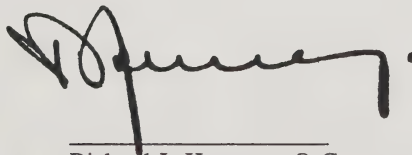
"48. Where the Board has certified a bargaining agent for a bargaining unit and no collective agreement binding on the employees in the bargaining unit is in force, the bargaining agent may, by notice, require the employer of those employees, or the employer may, by notice, require the bargaining agent to commence collective bargaining for the purpose of entering into a collective agreement."

(emphasis added)

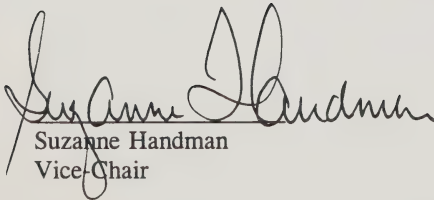
Insofar as there was "...no collective agreement binding on the employees in the bargaining unit..." in force at the time, the notice provided to the employer on June 14, 1993, constituted the appropriate notice to bargain required by section 48 of the Code. The parties' subsequent attempts at bargaining met the requirements of section 50(a) of the Code. Thereafter, the notices to the Minister and his response of November 29, 1993 provided the necessary compliance with sections 89(1)(a) to (d) of the Code. Accordingly, the Board finds that, effective seven days from the date of November 29, 1993, the parties acquired the legal right to strike or lockout for the entire bargaining unit.

In the circumstances, we find that the requirements of sections 50 and 89(1) and 89(2) of the Code have been met; and that employees in the entire bargaining unit for which the union has been certified, are in a legal strike position.

The employer's application is dismissed.



Richard I. Hornung, Q.C.
Vice-Chair



Suzanne Handman
Vice-Chair



Calvin B. Davis
Member



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Summary

Brink's Canada Limited, *applicant*, and Independent Canadian Transit Union, Local no. 1, *respondent*.

Board File: 530-2285
CLRB/CCRT Decision no. 1084
October 24, 1994

Application for review (Part I - Industrial Relations, section 18). Fragmentation of existing bargaining unit.

Brink's Canada Limited filed an application seeking to replace the recently established province-wide unit with three separate units. The application was presented in the context of a collective bargaining impasse between Brinks and ICTU where Brinks wished to negotiate three collective agreements corresponding to its branch locations and ICTU insisted on the negotiation of one collective agreement for the single Board certified unit. That issue was determined by the Board in a previous decision involving the same parties (decision no. 1053) in which the Board held that the parties were required to negotiate a single collective agreement applicable to the entire unit.

Résumé

Brink's Canada Limited, *requérant*, et Syndicat canadien indépendant du transport, section locale 1, *intimé*.

Dossier du Conseil: 530-2285
CLRB/CCRT Décision n° 1084
le 24 octobre 1994

Demande de révision (Partie I - Relations du travail, article 18). Fragmentation d'une unité de négociation.

Brink's Canada Limited demande au Conseil de fractionner en trois unités distinctes, l'unité qu'il a récemment établie à l'échelle provinciale. La demande a été présentée dans le contexte d'une impasse où Brink's et le SCIT se sont retrouvés lors des négociations collectives, du fait que Brink's voulait négocier trois conventions collectives correspondant à ses emplacements, alors que le SCIT voulait en négocier une seule pour l'unité accréditée par le Conseil. Celui-ci avait déjà tranché cette question dans une décision antérieure visant les mêmes parties (décision du CCRT n° 1053), dans laquelle il a statué que les parties devaient négocier une seule convention collective qui s'appliquait à l'ensemble de l'unité.



In the present case, the request for review appears to be designed to circumvent the Board's orders contained in decision no. 1053 and the bargaining process. The Board, after considering the various grounds invoked by Brinks, concludes that there are no sound labour relations reasons to justify the fragmentation of the existing unit. Consequently, the application is dismissed.

Dans la présente affaire, la demande de révision semble constituer un prétexte pour contourner les ordonnances du Conseil dans la décision 1053 et se soustraire au processus de négociation collective. Le Conseil, après avoir examiné les motifs invoqués par Brink's, en arrive à la conclusion que rien ne justifie, du point de vue de saines relations du travail, la fragmentation de l'unité. Par conséquent, la demande est rejetée.

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Reasons for decision

Brink's Canada Limited,

applicant,

and

Independent Canadian
Transit Union, Local no. 1,

respondent.

Board File: 530-2285
Decision no. 1084
October 24, 1994

The Board was composed of Mr. Richard I. Hornung, Vice-Chair; and Ms. Suzanne Handman, Vice-Chair; and Mr. Calvin B. Davis, Member. Hearings were held in Vancouver on August 16-17 in related file no. 725-350.

Appearances

Mr. Michael W. Hunter and Mr. Gregory J. Heywood, for Brink's Canada Limited; and

Mr. G. James Baugh and Ms. Gina Fiorillo, for the Independent Canadian Transit Union, Local no. 1.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

I

This case concerns an application for review pursuant to section 18 of the Canada Labour Code filed with the Board by Brink's Canada Limited ("Brinks") on April 6, 1994. The applicant requests that the Board amend the order it issued on April 8, 1993, certifying the Independent Canadian Transit Union ("ICTU") as the bargaining agent for the employees of Brinks employed in British Columbia and

replace it with three certifications covering the same employees. In essence, the applicant seeks to subdivide the existing single, province-wide unit into three bargaining units, described as follows:

"Unit No. 1: All employees of Brink's Canada Limited employed on Vancouver Island, excluding office and sales staff and those above.

Unit No. 2: All employees of Brink's Canada Limited employed at and from the Vancouver office at 247 East First Avenue, excluding office and sales staff and those above.

Unit No. 3: All employees in British Columbia except those employed on Vancouver Island, those employed at and from the Vancouver office at 247 East First Avenue, office and sales staff, and those above."

Following a review of the file, the Board concluded that the parties' detailed submissions together with the investigation report provided sufficient information to dispose of this application without a public hearing.

On August 16, 1994, at the time of a hearing held in Vancouver in another case involving the same parties (file no. 725-350), Brinks and ICTU were advised of the Board's decision to dismiss the present application. The reasons are as follows:

II

This application is one of a number of proceedings involving Brinks and ICTU. A review of the issues involved is very relevant to the present case.

Brinks, a corporation operating on a world-wide basis, provides secure transportation of money and valuables. Its branches in British Columbia are located in Vancouver, Victoria, and Kelowna/Kamloops.

On March 30, 1992, the Board certified IWA-Canada, Local I-217 ("IWA") as the bargaining agent for a unit comprising:

"all employees of Brink's Canada Limited employed in British Columbia, excluding office and sales staff and those above."

Brinks and IWA subsequently negotiated a collective agreement for those employees working at Vancouver and Victoria and another agreement for those employed in Kelowna and Kamloops. The term of the agreement for Brinks' operations in Vancouver/Victoria operated from February 1, 1990 to January 31, 1993 whereas the Kelowna/Kamloops agreement operated from November 8, 1991 to November 8, 1994. Consequently, the employees concerned, while covered by a single certification order, were subject to two separate collective agreements, each having a different expiry date.

On January 11, 1993, ICTU brought a raid application pursuant to section 24 of the Code to represent the employees in the province wide unit described above. IWA opposed ICTU's application for certification on the ground that, inter alia, the Kelowna/Kamloops agreement was still in force and as a result, the certification application was untimely. ICTU, in reply, maintained that there can be only one collective agreement for a single bargaining unit.

The Board, in Brink's Canada Limited (1993), 91 di 175 (CLRB no. 1005), rejected the objection pertaining to the timeliness of the application. In the Board's view, there was no collective agreement in force at the time applicable to the unit as a whole. As for the issue pertaining to the number of collective agreements permitted for a single bargaining unit under the Code, the Board stated:

"... the existence of two collective agreements, with different termination dates, purporting to represent employees in a single Board-certified unit is inconsistent with the terms of section 24(2) of the Code..."

(page 178)

The Board allowed the application presented by ICTU and on April 8, 1993, following a representation vote, certified ICTU as the bargaining agent for the employees in the province-wide unit.

On June 14, 1993, ICTU gave notice to Brinks of its intention to begin negotiations with respect to the collective agreements that applied to both Kelowna/Kamloops and Vancouver/Victoria.

During the course of the negotiations, Brinks insisted on maintaining two separate collective agreements, one for the Vancouver/Victoria area and the other for the Kelowna/Kamloops area. In response to Brinks' refusal to negotiate a single collective agreement for the entire bargaining unit, ICTU, after obtaining Ministerial consent, filed a complaint of bad faith bargaining against Brinks.

A hearing was held with respect to this complaint on April 5 and 6, 1994. The Board, in its decision Brink's Canada Limited (1994), as yet unreported CLRB decision no. 1053, rendered on April 15, 1994, found the employer's position of maintaining two collective agreements for the single certified unit to be untenable:

"... The Board's position in this regard has been unequivocal:

'... In looking at the Code, it is clear to us that a certification implies a single collective agreement; that parties cannot negotiate more than one collective agreement where there is a single certification order...'

(Alberta Government Telephones Commission (1991), 76 di 172 (CLRB no. 726) at page 184)

Therefore, the parties are clearly required to negotiate a single collective agreement applicable to the entire unit for which the certification order issued."

(page 3)

On April 6, 1994 during the hearings on the bad faith bargaining complaint, Brinks filed its application for review to obtain three bargaining units in the place of the province-wide unit.

III

The present application was filed under section 18 of the Code which permits the Board to revise established bargaining unit structures and its certification orders. At issue is the redefinition of the existing bargaining unit configuration.

Sections 18 states:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

The Board, in numerous decisions, has dealt with the determination of appropriate bargaining unit structures. It is not our intention to provide a lengthy review of the Board's well-established jurisprudence on this subject. Suffice it to say that, as a general principle, the Board favours the creation and maintenance of larger comprehensive bargaining units. This preference for larger units is evidenced even where an employer operates at more than one location in the Board's jurisdiction.

The Board has frequently found to be appropriate multi-location units and, in certain industries, nation-wide bargaining units. Such units are considered to be more conducive to orderly collective bargaining and to stable labour relations (see George W. Adams, Canadian Labour Law, 2nd ed. (Aurora: Canada Law Book Inc., 1994), at chapter 7).

As a corollary to the Board's stated preference for broader-based bargaining, the Board looks with disfavour upon the fragmentation of established bargaining units. Before the Board will subdivide a unit, the applicant has a heavy burden of providing convincing grounds for doing so. In Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59), the Board stated:

"Although as a general principle, the Canada Labour Relations Board rejects the idea that the issuance of a bargaining unit certification to a union should in any way be interpreted by that union, under the terms of the Code, as possessing it with 'property rights' in the continued existence of this certification, the 'balkanization' of an existing bargaining unit is a very serious matter, especially when the unit at issue is a single all-encompassing unit of all the employees of an employer or of all the employees in a well distinguishable group, be it craft or otherwise.

This Board, in those cases, will expect the applicant to shoulder the onus of presenting good and sufficient evidence that this extraordinary measure is justified and is compelling the Board to 'break up a unit'."

(pages 33; 369-370; and 494)

The position set out above has been adopted in further decisions and the Board's approach regarding the fragmentation of a bargaining unit is now well established: units should not be fragmented except for compelling reasons (see Quebec Ports

Terminals Inc. et al. (1992), 89 di 153; and 93 CLLC 16,035 (CLRB no. 967); Canadian Broadcasting Corporation (1991), 84 di 1 (CLRB no. 846); Canada Post Corporation (1990) 81 di 187; and 14 CLRBR (2d) 195 (CLRB no. 818), upheld by the Federal Court of Appeal in Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al., judgment rendered from the bench, no. A-626-90, September 12, 1991 (F.C.A.); and Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675)).

The Board has nevertheless subdivided units where it has been clearly shown that the bargaining units were no longer appropriate and it was in the best interests of labour relations to modify them (see Canadian Broadcasting Corporation (1977), 19 di 166; [1977] 2 Can LRBR 481; and 77 CLLC 16,102 (CLRB no. 94); and AirBC Limited (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797)).

The instant application therefore required the Board to determine whether there were any sound labour relations reasons to warrant the requested subdivision.

IV

Brinks has raised several arguments to support its request for review. Its principal ground relates to the parties' impasse in collective bargaining, namely Brinks' insistence upon negotiating separate collective agreements based upon geographic location, as it has done in the past, while ICTU maintains that there cannot be more than one collective agreement covering employees in the single bargaining unit. The solution to this bargaining impasse, according to Brinks, is for the Board to issue separate certifications which would then result in only one collective

agreement per certification. In this regard, Brinks refers to the decision of Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726).

Additional arguments submitted by Brinks, as detailed below, essentially relate to: (1) the parties' bargaining history, (2) the absence of a community of interest amongst the employees at the different locations, (3) differences in their terms and conditions of employment, and (4) the competitive disadvantage of Brinks in the armoured car industry.

ICTU disputes each of the arguments raised by Brinks and urges the Board to summarily dismiss the employer's application. In ICTU's opinion, the section 18 application constitutes a transparent attempt by Brinks to avoid its collective bargaining obligations and to avoid compliance with the recent orders of the Board contained in Brink's Canada Limited (1053), supra.

V

The Board considered the reasons set out in the application in light of its established principles.

The impasse in the collective bargaining between the parties stems from the parties' disagreement over the number of collective agreements which can be concluded for a bargaining unit. This issue is now moot. The Board, in Brink's Canada Limited (1053), supra, not only reiterated its position that parties cannot negotiate more than one collective agreement where there is a single certification order but also specifically ordered Brinks to commence collective bargaining and to make every reasonable effort to enter into a collective agreement applicable to the entire bargaining unit certified by the Board.

The applicant nevertheless insists on its bargaining history, namely that its operations in British Columbia have been governed by two collective agreements, and it relies on the decision of Alberta Government Telephone Commission (726), *supra*, as support for its request for separate certifications.

The same issue was raised many years ago in Canadian Pacific Railway Company (1951), 52 CLLC 16,623. The applicant sought to divide a single craft unit, which had previously been found to be appropriate, into two territorial units of the same craft on the grounds that there was a territorial demarcation and two collective agreements in force. The Board did not consider such grounds to be sufficient justification for subdividing the existing unit:

"The Board is of opinion that ordinarily it is not conducive to stable labour relations or orderly collective bargaining negotiations to subdivide a well-established craft unit of employees of an employer found to be an appropriate unit by the Board into several units consisting of segments of the same craft group of employees. Consequently, in any particular case where it is sought to do this, convincing grounds for so doing should be established.

... The fact that the Intervener and the Respondent have found it mutually desirable to continue the practice followed prior to the existing certification of completing separate agreements on a territorial basis covering employees in the unit is not in itself, in the opinion of the Board, a sufficiently convincing reason for splitting the bargaining unit at this time."

(page 1331)

As for the decision of Alberta Government Telephones Commission (726), *supra*, it offers little assistance to the applicant. The Board, in that case, found there to be a clear distinction between the work functions of the three different occupational groups in question. While three certifications were issued, each of the three

separate units certified by the Board was province-wide; there was no division of the bargaining unit along geographical lines. It may also be noted that, contrary to the present case, both parties were interested in maintaining the status quo of continuing to bargain three separate collective agreements for the distinct groups of employees.

The next ground raised by the applicant concerns the absence of a community of interest between the three groups. We are unable to find any merit in this argument. Brinks provides the same services at each location, and there are set policies and procedures for all branches. Compliance is ensured by its regional managers (see Brink's Canada Limited (1992), 87 di 65; and 16 CLRBR (2d) 132 (CLRB no. 918)). In British Columbia, the operations of Brinks are centralized and are managed by the Western Regional Manager.

Brinks also claims that the terms and conditions of employment of the Vancouver/Victoria group and the Kamloops/Kelowna group are different but has provided no facts to substantiate this allegation. Even assuming the existence of some differentiation between the concerned groups, such differences could be accommodated by a single collective agreement with different appendices or documents relating to particular terms and conditions, if required. In fact, the applicant is cognizant of such a possibility, but rejects the idea based on the potential difficulties involved. We may refer to the applicant's written submissions where it states:

"... we acknowledge that, under the Board's current policy, it is possible to negotiate a single collective agreement with separate addendums, but as a practical labour relations matter, that is much more difficult to accomplish because of the natural instincts of employees covered by the same collective agreement to demand 'parity'."

The remaining argument concerns Brinks' competitive disadvantage in the armoured car industry. The applicant considers its main competitor, Loomis, to be at a distinct advantage in the market place. According to this argument, because Loomis is unionized on a location by location basis with collective agreements having different expiry dates, it is less likely to be subject to service disruptions. Brinks wishes to be on the same competitive footing as its competitors by obtaining separate branch certifications.

The fact that Loomis has separate branch certifications does not justify the fragmentation sought by Brinks. Equally, the fact that branch units were considered to be appropriate at Loomis does not render the province-wide unit at Brinks inappropriate. While consideration is given to bargaining unit patterns in a particular industry, this factor alone is not sufficient to split a bargaining unit; other elements must be present for the Board to conclude that such a modification is warranted.

As for the alleged competitive disadvantage, this ground is, at best, speculative. This is borne out by the following passage contained in the applicant's submission:

"... The business is extremely competitive, and the customers can and do switch on very short notice. ... the majority of customers weigh the prospect of interruptions (sic) in service due to labour dispute (sic) as a significant factor in choosing an armoured car service. A location-by-location certification, which permits different expiry dates for the collective agreements, is obviously far less likely to result in service disruptions."

(emphasis added)

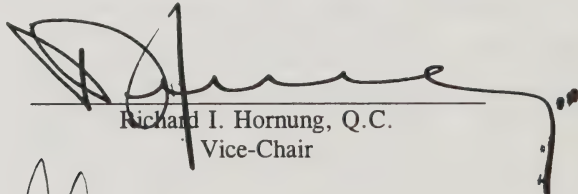
Needless to say, the Board will not base its decisions on considerations of a hypothetical nature. (See Co-opérative de Télévision de l'Outaouais (1975), 10 di 27; [1975] 2 Can LRBR 278; and 75 CLLC 16,178 (CLRB no. 49).)

Brinks clearly wishes to negotiate separate collective agreements for its separate locations. This avenue is not open to it. The present application attempts to achieve the same result: three units which would allow for three distinct collective agreements. This does not constitute a bone fide labour relations purpose; rather, it appears to be designed to circumvent the Board's orders contained in Brink's Canada Limited (1053), supra, and the bargaining process.

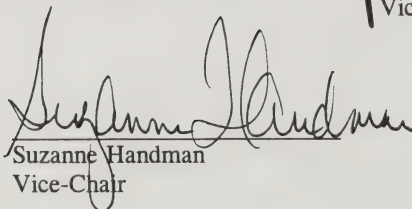
VI

Brinks has failed to show that the recently established bargaining unit is not appropriate for collective bargaining. It has also failed to show any significant change in circumstances which would lead the Board to alter the existing bargaining unit.

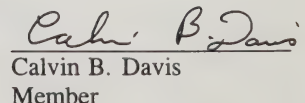
The application for review is, therefore, dismissed.



Richard I. Hornung, Q.C.
Vice-Chair



Suzanne Handman
Vice-Chair



Calvin B. Davis
Member

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Summary

Pierre Bonhomme, *complainant* and J.C. Fibers Inc., *employer*.

Résumé

Pierre Bonhomme, *plaignant*, et Les Fibres J.C. Inc., *employeur*.

Board File: 745-4682
CCRT/CLRB Decision no. 1085
October 18, 1994



Dossier du Conseil: 745-4682
CCRT/CLRB Décision n° 1085
le 18 octobre 1994

In this unfair labour practice complaint, the complainant alleges that his employment was terminated contrary to section 94 of the Code, because of his participation in the formation of a trade union.

The Board allowed the complaint.

The Board reiterated that an employer's actions must not restrict or call into question employees' rights to organize for the purposes of collective bargaining. Freedom of association prohibits the employer from participating in the formation or the administration of a trade union and from interfering with the representation of employees. The neutrality required, on the part of an employer, is a direct result of this restriction.

Having reviewed the general circumstances of this case, particularly the employer's actions aimed at persuading employees not to exercise their rights under the Code and the union activities of the complainant, the Board concluded that the complainant had been terminated in violation of the Code.

Le Conseil est saisi d'une plainte de pratique déloyale alléguant violation de l'article 94 du Code. Selon le plaignant, l'employeur a mis fin à son emploi à cause de sa participation à la formation d'un syndicat.

Le Conseil a fait droit à la plainte.

Le Conseil a réitéré que le choix des employés de s'organiser collectivement pour négocier leurs conditions de travail est un droit dont l'exercice ne peut être limité ou remis en question par les agissements de l'employeur. La liberté d'association comporte une interdiction pour l'employeur de participer à la formation ou à l'administration d'un syndicat et d'intervenir dans la représentation des employés. La neutralité exigée des employeurs dans ces circonstances découle de cette interdiction.

Après avoir évalué le contexte général de l'affaire, notamment les interventions de l'employeur pour dissuader les employés d'exercer leurs droits prévus au Code et les activités syndicales du plaignant, le Conseil a conclu que l'employeur a congédié le plaignant contrairement au Code.

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Reasons for decision

Pierre Bonhomme,

complainant,

and

J.C. Fibers Inc.,

employer.

Board File: 745-4682

CCRT/CLRB Decision no. 1085

October 18, 1994

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. Robert Cadieux and François Bastien, Members. A hearing was held on April 28 and 29 and July 4 and 5, 1994, at Montréal.

Appearances

Mr. Michel Morissette, accompanied by Mr. Pierre Bonhomme, for the complainant;
and

Mr. Gilles Touchette, accompanied by Mr. Joe Colubriale, for the employer.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The Proceedings

An unfair labour practice complaint was filed with the Board by Pierre Bonhomme on November 27, 1993. He alleges that the employer, J.C. Fibers Inc., unlawfully terminated his employment on November 10, 1993, because he participated in the formation of a trade union.

For the employer, it was the complainant himself who terminated his own employment when he repeatedly refused work assignments, more particularly those involving trips to the United States. It submitted that the complainant must carry out all work assignments for all destinations. The complainant disagreed and argued that he was hired as a local or city driver, and therefore did not have to accept those assignments, involving trips to the United States.

II

The Facts

1. The Context

The employer operates a recycling paper recovery and general trucking business. It carries out the majority of its activities from its head office in Chambly. The company also leases paper storage space in St-Jean.

On August 5, 1993, the Graphic Communications International Union, Local M-41, filed an application for certification to represent the drivers employed by the employer. On February 24, 1994, the Board decided that the employer's transportation activities came under federal jurisdiction, and certified the union.

On August 3, 1993, the employer laid off ten drivers, including the complainant. On or about August 16, the employer recalled all but three of these drivers; the complainant was among the three not recalled. Despite this recall, the drivers filed an unfair labour practice complaint on August 27, 1993, alleging that the employer had laid them off for participating in the formation of a trade union.

On November 4, 1993, the complainants and the employer settled the matter, and the complaints were withdrawn. The agreement provided, inter alia, for the reinstatement

of the complainant, without compensation, within five days of the signing of the agreement.

The complainant was in fact recalled on November 4, reported for work on November 5, but was dismissed on November 10, 1993. It was this dismissal that gave rise to his complaint.

2. The Complainant's Terms and Conditions of Employment

In January 1993, Mr. Bonhomme applied for a job that was advertised on January 13, 1993 in a regional newspaper. The employer was looking for "two drivers for local transport and two drivers for out-of-province transport." On January 24, 1993, the complainant met with Frank Colubriale, operations manager. He told Mr. Colubriale that he was applying for the local driver job, that he did not want to travel outside Quebec, and especially to the United States, because of his state of health and because he did not speak English. According to the complainant, Frank Colubriale told him that he would not be travelling to the United States, but that he would have to travel to Québec and Cornwall.

Frank Colubriale maintained that he did not offer Pierre Bonhomme these working conditions. He acknowledged that Mr. Bonhomme stated that he did not want to make long trips and that he wanted to return home every night. According to Mr. Colubriale, city drivers make trips that enable them to return home every night, unlike long-distance drivers who generally are away more than 24 hours. City drivers are paid by the hour, whereas long-distance drivers are paid by the kilometre.

During the first three months of his employment, the complainant worked primarily as a yard driver, moving vehicles around the company's Chambly yard. He made a few trips to Québec and Cornwall and to the St-Jean storage facility.

In mid-June 1993, Mr. Bonhomme was asked to make his first trip to Saugerties, located some 50 kilometres south of Albany, New York, in compliance with a contract to transport paper. The effective date of this contract was March 1, 1993, and as early as February 1993, the company had advertised for "transport truck drivers for the United States" in preparation for this contract. During this period, the employer decided to take steps to ensure that all its drivers met the requirements of Canadian and American authorities with respect to highway transportation regulations and, to this end, it asked them to provide the necessary documents. The employer wanted all its drivers to be able, at any time, to travel anywhere the employer did business, including the United States. When first hired, Mr. Bonhomme did not meet these requirements. His file was later updated as were those of the other drivers in the spring of 1993. On June 9, his file was complete.

Between June 16 and July 29, 1993, Mr. Bonhomme made seven trips to Saugerties. The complainant's explanation to the Board is that he accepted these assignments under protest, pointing out in each instance that these assignments did not meet the terms and conditions agreed upon when he was hired. Each time, the employer invoked a shortage of drivers, as well as the urgency of the situation and the need to fulfil the contract, adding that Mr. Bonhomme would be doing it a favour by accepting these assignments.

The complainant complied therefore but only to accommodate the employer. He realized that a refusal could lead to his dismissal. According to Mr. Bonhomme, these trips were made under particularly difficult conditions. Although the employer estimated that a trip to Saugerties took on average 12 hours, experience showed that it in fact took 15 to 18 hours. One had to add to the travelling time the time spent waiting while the truck was loaded and then unloaded upon arrival at the customer's. Local drivers assigned to these trips, like Mr. Bonhomme, had to return the same day. Long-distance drivers were paid by the kilometre, which meant that they were not paid for the waiting time at the customer's unlike local drivers who were paid for all

time spent at work. Moreover, long-distance drivers were given a sum of money in American funds and a credit card, while Mr. Bonhomme received only \$20 for highway tolls. According to the complainant, these conditions were worrisome given his very limited knowledge of English, particularly if a mechanical breakdown occurred. As he was not paid for waiting time, these terms and conditions were also clearly less favourable.

3. The Union Organizing Campaign

At the end of July 1993, Mr. Bonhomme contacted a union representative to discuss the formation of a trade union. He signed a membership application on July 28 and, in the ensuing days, signed up other drivers. On July 30, François Fortier, a fellow driver, agreed to help in signing up members. The organizing campaign continued during the weekend and several employees joined the union. This initiative coincided with the employer's decision, announced a few days earlier, to stop paying overtime after 44 hours of work, and to change the terms and conditions governing meals.

Late in the afternoon of Tuesday, August 3, as Mr. Bonhomme was getting ready to refuel a leased truck, Mr. Colubriale told him to leave it and to give him the vehicle's registration papers. He told Mr. Bonhomme that some company had decided to stop leasing trucks and that he was being laid off because there was no work. Mr. Colubriale insisted on knowing whether the complainant "had understood." Following this conversation, Mr. Bonhomme contacted the union representative to ask him to file an application for certification.

During his layoff from August 3 to November 4, Mr. Bonhomme remained active in union affairs. On November 4, 1993, he attended the Board's hearings, where the question of the Board's constitutional jurisdiction over the employer's activities was debated.

Two drivers, François Fortier and Michel Sauriol, testified on the employer's interference in the union organizing in August 1993. François Fortier explained that, on August 2, 1993, Frank Colubriale and Joe Colubriale, president and general manager of J.C. Fibers Inc., accompanied by Mariette Beaudet, executive assistant, met with the employees to ask them why they wanted a union. Employees were also told that a union was not necessary, that the employer provided good working conditions, and was prepared to re-examine the conditions pertaining to overtime and meals. When questioned about his union membership, Mr. Fortier denied signing up, and said that he did not know whether other persons had done so.

Michel Sauriol, who worked for the employer until October 1993, explained that, on August 2, 1993, he saw Frank and Joe Colubriale around 10:30 p.m. in the yard of the Chambly facility. He was asked why the employees wanted a union, whether he himself had joined the union, and whether he knew if others had followed suit. Mr. Sauriol replied that he knew nothing about the matter. On October 18, 1993, Michel Sauriol left the company following a disciplinary interview during which Joe and Frank Colubriale informed him that he was being suspended for refusing to go to New England. During this interview, Joe Colubriale again asked him about his union membership, adding: "The union is useless, but I'm providing jobs for Quebecers." Joe Colubriale swore at him, tried to hit him, and told him to leave the premises. Michel Sauriol complied and never returned. He explained to the Board that he had been hired as a local driver by Frank Colubriale who had told him that he would have to travel to the Toronto area from time to time, but would not be travelling to the United States. Even though Michel Sauriol had indicated that he did not want to make any long-distance trips, the employer continued to assign him trips to travel to the United States, which he initially agreed to do to accommodate the employer. However, his refusal in mid-October 1993 to accept this change to his terms and conditions of employment resulted in being called to a disciplinary interview on October 18.

With regard to François Fortier, Frank Colubriale followed him right to the St-Jean storage facility at the beginning of October. Once there, Mr. Colubriale made it clear to him that the question of overtime and meal breaks would be re-examined. He questioned Mr. Fortier about his union membership, indicating that the employer was aware of who had joined, and that a lawyer could help the employees get rid of the union. He suggested to Mr. Fortier to discuss the matter with his colleagues making it clear that he wanted an answer in a few days. He also told Mr. Fortier that he would remain a local driver assigned to the same truck.

A meeting was called in mid-September 1993 by a driver, Yvon Cournoyer to go over essentially those same matters. Mr. Cournoyer then tried to persuade the drivers to abandon the union and form a "shop committee." He told them that Joe Colubriale was prepared to re-examine the kilometric rate of pay and the conditions governing meals. The drivers were to inform Mr. Colubriale of their decision concerning the union. Mr. Fortier attended this meeting and was asked by Mr. Cournoyer to try to persuade the drivers. Mr. Fortier told him he was having none of it, and he referred him to Mr. Bonhomme, suggesting that if anyone was to make a decision, it was Mr. Bonhomme. No employee withdrew from the union following this meeting.

On October 20, 1993, François Fortier was summoned to a disciplinary interview attended by Frank and Joe Colubriale and Mariette Beaudet. Mr. Fortier was asked again if he and other employees had joined the union, and was accused of heading the organization. During this interview, Mr. Fortier was given a week suspension following his refusal to travel to the United States a few days earlier. Mr. Fortier, like Messrs. Sauriol and Bonhomme, explained to the Board that he had been hired as a city driver in March 1992. He had worked previously for the company from September 1991 to the beginning of March 1992, when forced to resign because he could no longer tolerate night work. Since François Fortier was a good employee, Frank Colubriale recalled him to work on March 23, 1992. He agreed to hire Mr. .

Fortier as a city driver, and not to dispatch him to the United States because of his lack of English.

4. The August 1993 Lay-off

Joe Colubriale explained that, at the beginning of August 1993, he decided to stop leasing eight or nine tractors used for the Saugerties contract, which had not yet expired. That decision resulted in the laying off of ten drivers on August 3. At the same time, the employer advertised on August 2, 3, 4 and 5 for "transport truck drivers, long distance, United States only." In the meantime, it used drivers from a manpower agency to continue operating.

When questioned about his reasons for using agency drivers when he was laying off his regular drivers, Mr. Colubriale stated that he had laid these drivers off because he was "not happy with the union." He had then chosen to hire agency drivers to meet the demand until he made a decision; he decided in mid-August to reinstate seven drivers. Mr. Bonhomme was not recalled at that time as he was "furious because he had brought in the union."

Mr. Colubriale became aware of the application for certification on August 6, 1993, which application he termed "very bad news." He testified that he did not recall questioning employees in August 1993 about their union activities, although he admitted he may have done so at least once, in his words, "to find out."

Frank Colubriale on the other hand denied discussing the matter with François Fortier on August 2, 1993, and stated that he did not discuss it with other employees. However, he admitted speaking to François Fortier in St-Jean in October because he was curious to know if there was any truth to the rumours of unionization. He denied raising other matters at the time.

With regard to Pierre Bonhomme's recall in November 1993, Joe Colubriale first stated that he had not given his son Frank, any particular instructions regarding his work assignment but admitted telling him "not to tell him the same thing, so Mr. Bonhomme can't say we always sent him to the same place" and "dispatch him locally so he can't say I did it on purpose because of the union."

5. The Recall to Work

On November 5, 1993, Mr. Bonhomme reported for work. The dispatcher assigned him a trip to Albany. He refused, explaining that he was a city driver. In his mind, the return to work agreement meant that he had been recalled to do work as a city driver, as had been the agreement when he was hired.

Faced with his refusal, the dispatcher sent him home, seemingly because there was no work. The next day he was asked by the dispatcher to report for work on November 8. On that day, the dispatcher told him that in order to get an assignment, he first had to check his truck. Mr. Bonhomme discovered a mechanical problem, notified the dispatcher, and returned home. He waited until 10:30 a.m. for a call to return to work, and then left the house and did not get back until late that evening. The employer had left a message on his answering machine asking him to report for work the following day, November 9. Mr. Bonhomme's first assignment that day was to park vehicles in the yard. Around 9:00 a.m., the dispatcher asked him to sign a disciplinary notice dated November 9. In the notice, the employer took exception to Mr. Bonhomme's refusal of his United States assignment of November 5, given that he had made several trips there in June and July, and made it clear that any further refusal could lead to his dismissal. Mr. Bonhomme refused to sign the document, and was then assigned to local transport. When he returned at the end of the day, the dispatcher told him that he had to travel to Albany the next day. Mr. Bonhomme refused. The dispatcher warned that if he did not intend to go to Albany, he had better

not report for work on November 10. Mr. Bonhomme did not report on November 10 and received the following letter:

"Dear Mr. Bonhomme:

Please find enclosed your vacation pay (4%) and your record of employment which stipulates that you terminated your employment by refusing repeatedly the work assigned in recent days.

*Joe Colubriale
President"*

(translation)

III

Decision

In unfair labour practice complaints alleging violation of section 94, the Board repeatedly stated that the wish of employees to associate in order to negotiate collectively their terms and conditions of employment is a right that cannot be limited or compromised by the employer's actions. Section 94(1) stipulates the following:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

(b) contribute financial or other support to a trade union."

In Bank of Montreal (Bank and Cecil Streets Branch, Ottawa) (1985), 61 di 83; and 10 CLRBR (NS) 129 (CLRB no. 518), the Board had the following to say on this question:

"The point of departure for previous Board decisions is that, however much an employer may feel that his unfettered right to manage and to maximize his profits may be modified if his employees choose to give up the making of individual contracts of employment and decide to switch to collective bargaining and collective agreements, it is basically not his business what they want to do. Above all, it is contrary to law if he places pressure on them to dissuade them from making such a decision. It would be naive in the extreme, of course, to believe that the law can make employers accept with equanimity the change in the balance of power that unionization usually brings about. But it can, and is designed to, deter employers from overt behaviour that would coerce or intimidate employees into not implementing their right to associate in accordance with the scheme of the Canada Labour Code."

(pages 101; and 147)

The neutrality required of employers in these circumstances (see Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (1979), 34 di 651; [1979] 1 Can LRBR 266; and 80 CLLC 16,100 (CLRB no. 173); General Aviation Services Limited (1979), 34 di 791; and [1979] 2 Can LRBR 98 (CLRB no. 182); and Télévision Saint-François Inc. (1981), 43 di 175 (CLRB no. 306)) is the natural consequence of the fact that section 94(1) prohibits the employer from participating in the formation or administration of a trade union and from interfering with the representation of employees.

The Board applies these principles in assessing the merits of a complaint under section 94(3)(a)(i), which reads as follows:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."

In order to determine whether the employer's actions are tainted with anti-union animus, and hence contrary to the Code, the Board will assess the general context of the case, in particular the link between the events related by the parties and the employees' union activities.

In order to decide the present case, the Board first had to assess the witnesses' credibility, since conflicting versions were given on a number of key events. After reviewing all the testimony, the Board decided that the version given by the complainant and his witnesses is to be preferred to that of the employer's witnesses, particularly with respect to the terms and conditions under which the complainant was hired and the reasons that led to his dismissal on November 10.

With regard to the terms and conditions of hiring, the versions of Messrs. Fortier and Sauriol support the complainant's version. These two persons were offered, at different times, similar terms and conditions upon their hiring and found themselves, in October and November 1993, in the same situation as Mr. Bonhomme, which situation jeopardized their employment status. On this question and in particular on the question of the employer's participation in the union's affairs, the Board disregarded Frank Colubriale's testimony, which was vague and contradicted the testimony of Joe Colubriale and Mariette Beaudet on essential facts, in particular when he found out about the application for certification.

The Board is satisfied that the complainant was hired as a city driver under the terms and conditions he described to the Board. The employer's claim that there is no difference between city drivers and long-distance drivers is contradicted by the distinction it made between categories in the jobs it advertised. The employer may

legitimately want its drivers to be versatile and meet all requirements of highway transportation regulatory agencies. To this end, however, it cannot alter, at its discretion, the terms and conditions of employment agreed to with an employee. Similarly, a party to the contract of employment may legitimately want to alter certain terms and conditions of this contract, but both parties must approve of the change. In the present case, the complainant regularly told the employer that he agreed to make trips to the United States only in special and exceptional circumstances, because this type of assignment was not normally given to city drivers. By refusing to alter his contract of employment, the complainant made sure that the terms and conditions of employment under which he was initially hired had to be maintained.

The Board does not believe that the employer thought, in June and July 1993, that Mr. Bonhomme's contract had been altered. Instead, it used the trips made to the United States as an excuse to claim, in November 1993, that Mr. Bonhomme's contractual status had been altered in July 1993.

In this sense, the employer's decision to dispatch the complainant to the United States beginning on November 5 shows that the employer had decided to test Mr. Bonhomme on this matter as soon as he returned to work. The Board believes that the employer itself created the situation, and that it then took advantage of it in order to discipline the complainant. The employer knew that Mr. Bonhomme would refuse these assignments or, at the very least, would protest quite strongly, so that the employer could try and justify possible disciplinary action.

The Board believes that all this was not a coincidence. The employer had taken the same approach in October in dealing with François Fortier and Michel Sauriol, whom it had also disciplined for the same reasons it disciplined Mr. Bonhomme. Moreover, the fact that the employer raised again, during the disciplinary interviews with Messrs. Fortier and Sauriol, the union's existence and their union membership reflects

its attitude towards the union. Its position had not changed since the beginning of August 1993, despite the recall in August 1993.

The employer's actions beginning in August cannot be considered isolated events. On the contrary, they are part of a specific set of circumstances and show that the employer intervened repeatedly to try and persuade the employees to change their mind regarding the union, either by promising improved terms and conditions of employment, the weakening of which triggered the organizing campaign, or by disciplining employees when its promises did not produce the anticipated results.

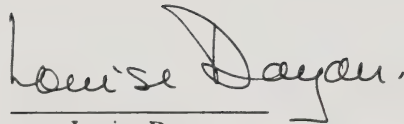
The employer's attitude towards Mr. Bonhomme in November 1993 is part of the scenario aimed at getting rid of the union's instigator and again bringing pressure to bear on the employees in order to persuade them to withdraw their support for the union which, at that point, it should be remembered, was not yet certified. The employer did not satisfy the Board that there was no connection between the action taken against the complainant and his union activities.

The Board finds that the employer contravened section 94(3)(a)(i) when it told the complainant on November 10 that it considered that he had terminated his employment. The Board believes that it was the employer who terminated the complainant's employment by creating a situation designed to force him to accept terms and conditions of employment different from those he had enjoyed prior to his recall to work, because he had exercised his rights under the Code,.

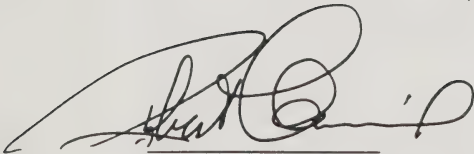
The Board orders the employer to reinstate Pierre Bonhomme and to compensate him for the pay and other benefits lost as a result of his dismissal.

The Board designates Ms. Suzanne Pichette, Director of its Montréal regional office, to assist the parties in implementing the above orders. The Board reserves the right to settle any question that may result from the implementation of these orders.

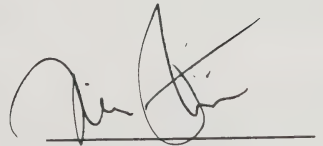
This is a unanimous decision.

A handwritten signature in cursive script, reading "Louise Doyon".

Louise Doyon
Vice-Chair

A handwritten signature in cursive script, reading "Robert Cadieux".

Robert Cadieux
Member

A handwritten signature in cursive script, reading "François Bastien".

François Bastien
Member

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Information

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Summary

Carmen Resel, Catherine Mirchandani, Maria Jesus Eraso, Christine L. Sinave, *complainants*, Canadian Union of Public Employees, Local 4027, *respondent*, and Iberia, Airlines of Spain, *employer*.

Board File: 745-4497; 745-4504;
745-4509; 745-4511

CCRT/CLRB Decision no. 1086
November 3, 1994

The complainants allege that the respondent union committed an act of gross negligence and therefore violated section 37 of the Canada Labour Code (Part I - Industrial Relations) when it neglected to file their group grievance within the timeframe prescribed by the collective agreement.

Although bargaining agents are not required to possess the same level of expertise as labour relations professionals, the Board is of the view that unions must achieve a certain level of competence to avoid reckless or grossly negligent behavior. The Board feels that in the instant case, the union acted incompetently and in a grossly negligent manner when it failed to determine the applicable time limits, or contrary to what obvious prudence might dictate, when it interpreted the relevant sections of the collective agreement without reference to the shortest possible timeframe. The Board therefore orders the union to refer the group grievance to arbitration and extends the applicable time limits set out to this end in the collective agreement.

Résumé

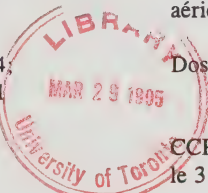
Carmen Resel, Catherine Mirchandani, Maria Jesus Eraso, Christine L. Sinave, *plaignantes*, Syndicat canadien de la Fonction publique, section locale 4027, *intimé*, et Ibéria, Lignes aériennes d'Espagne, S.A., *employeur*.

Dossiers du Conseil: 745-4497; 745-4504;
745-4509; 745-4511

CCRT/CLRB Décision n° 1086
le 3 novembre 1994

Les plaignantes soutiennent que le syndicat intimé a fait preuve de négligence grave, en violation de l'article 37 du Code canadien du travail (Partie I - Relations du travail), lorsqu'il a omis de présenter leur grief collectif dans les délais prévus à la convention collective.

Quoique les agents négociateurs n'ont pas à faire preuve du même niveau de compétence que celui exigé des professionnels en relations de travail, le Conseil est d'avis que les syndicats doivent tout de même respecter un certain niveau de compétence afin de ne pas tomber dans l'inconscience ou encore dans la négligence grave. En l'instance, le Conseil juge que le syndicat a fait preuve d'incompétence et de négligence grave en omettant de se pencher sur la question des délais ou, à tout le moins, en donnant l'interprétation la plus large possible à cette clause de la convention collective, alors que la prudence même exigeait de vérifier quelle était, selon toute hypothèse, l'échéance la plus rapprochée. Le Conseil ordonne donc au syndicat de renvoyer le grief collectif à l'arbitrage et proroge les délais prévus à la convention collective pour ce faire.



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Reasons for decision

Carmen Resel, Catherine Mirchandani, Maria Jesus Eraso and Christine L. Sinave,

complainants,

and

Canadian Union of Public Employees, Local 4027,

respondent,

and

Iberia Airlines of Spain,

employer.

Board Files: 745-4497
 745-4504
 745-4509
 745-4511

CCRT/CLRB Decision no. 1086
November 3, 1994

The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, and Mr. François Bastien and Ms. Sarah E. FitzGerald, Members. A hearing was held on December 13, 14, 15 and 22, 1993, at Montréal.

Appearances

Mr. Richard Cleary, for Ms. Mirchandani, Ms. Eraso and Ms. Sinave, complainants;
Mr. Denis Poitras, for Ms. Resel, complainant;
Mr. François Côté, accompanied by Mr. J.P. Levasseur, for the respondent; and
Mr. Carl LaRoche, accompanied by Messrs. Larivière and Wim Bless, Regional Director, for the employer.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, and Mr. François Bastien, Member.

I

THE FACTS

The Board received four complaints, filed pursuant to section 97 of the Canada Labour Code, alleging that the Canadian Union of Public Employees (CUPE) contravened section 37 of the Code. In keeping with its announcement to the parties at the hearing, the Board is issuing a single decision in these four complaints, which were heard jointly.

Ms. Resel, Ms. Mirchandani, Ms. Eraso and Ms. Sinave filed individual complaints with the Board on May 11, 17, 21 and 24, 1993 respectively.

The complainants were employed by Iberia Airlines of Spain (Iberia) in Montréal. After long and difficult negotiations, during which the Board heard and allowed a complaint of bad faith bargaining against Iberia (see Iberia Airlines of Spain (1990), 80 di 165; and 13 CLRBR (2d) 224 (CLRB no. 796); Iberia Spanish Airlines, S.A. v. Canadian Union of Public Employees et al., judgment rendered from the bench, no. A-442-90, February 18, 1991 (F.C.A.)), a collective agreement was signed at Iberia on March 15, 1991.

Shortly thereafter, the employer announced the restructuring of its North American operations. The local president, Monique Verreault, admitted that she learned of this plan through an internal company newsletter. It was known at that point that the Montréal office would be affected, but there were no details. The local union had even met briefly on May 7 to discuss rumours of the restructuring. At this meeting, the person assigned this file, Jean-Pierre Levasseur, a CUPE representative urged Monique Verreault to be alert and ready to respond.

In April 1991, Mr. Levasseur worked with Mr. Lalonde on the files assigned to the latter, including the Iberia file. Mr. Levasseur officially took over Mr. Lalonde's duties at the end of May 1991, upon Mr. Lalonde's departure. It was during this transitional period that Mr. Levasseur was assigned the Iberia file. Mr. Levasseur's union experience dates back to 1969, when he became a full-time union steward for Air Canada's flight attendants. He served in this capacity until 1973. In 1987 he became a union officer, and in 1991 a representative with CUPE. This experience enabled him to acquire a solid knowledge of labour relations in the aviation industry, particularly with respect to the administration of collective agreements and the handling of grievance procedures. The task of handling this file, during the crucial period when initial decisions are made by the union, fell in practice to Mr. Levasseur. The local president, Ms. Verreault, had decided in fact to rely largely on Mr. Levasseur's experience, first, because her own experience with respect to the grievance procedure was very limited and, second, because she was away on holidays from May 16 to 26, 1991. Ms. Verreault testified that when she left for vacation, Mr. Levasseur was responsible for carrying the matter through.

It was in this particular union context that the employer announced the restructuring of its North American operations. The Montréal office saw the majority of its operations transferred to other cities and, as a consequence, 23 positions were abolished. The ticket counter and administration department were to be handled by the 4 remaining positions. According to the union, these positions were filled by persons who, either were not members of the bargaining unit, or had less seniority than the persons who were laid off or terminated.

The persons affected were notified by the employer on Thursday, **May 9, 1991**. The local president, Monique Verreault, immediately contacted her CUPE representative to discuss what action to take in this difficult situation.

According to the testimony of its president and representative, the union had two main concerns: first, to ensure compliance with the seniority rights in the collective agreement and, second, to ensure that the employees were duly informed of the sums of money to which they were entitled under the severance pay plan and the unemployment insurance system. In the days following the announcement of the reorganization, the union convened a meeting of its members to provide them with this information. At the meeting, the majority of the employees signed individual letters written by the union representative, notifying the employer, pursuant to clause 24:03 of the collective agreement, of their intention to exercise their right to bump persons with less seniority. The collective agreement required that two working days' prior notice be given in this case. Some employees signed this letter after the meeting and immediately delivered it to the employer.

It should also be noted that two of the complainants, Ms. Resel and Ms. Mirchandani, each wrote the employer a letter which it received between Thursday, May 9 and Monday, May 13, 1991. Although the style and vocabulary of these letters vary, each contained according to their authors all the information necessary to lodge a grievance under the collective agreement that had been in force a scant two months. No action was taken on these letters and, except for producing them as exhibits at the second hearing of the collective grievance (described below) before arbitrator Jutras, the union did not take them into account.

To assert the seniority rights of certain employees whose duties, at least in part, were allegedly performed by less senior employees, the union finally agreed to file a collective grievance, contesting the way in which the employer laid off or terminated the employees. The grievance procedure set out in article 25 of the collective agreement provides for a 10-day time limit commencing on the date the complainant became aware of the incident that gave rise to the grievance:

"25.02 An employee, group of employees or the Union itself may file a grievance in writing to the person designated by the Company within ten (10) calendar days of the date on which the employee, group of employees or the Union itself became aware of the incident that gave rise to the grievance, but not later than ninety (90) calendar days following the incident that gave rise to the grievance."

(translation)

During his testimony, Mr. Levasseur pointed to the problems the union experienced in determining whether this case involved terminations or lay-offs and, depending on the case, the bumping procedure to be applied in the circumstances. He stated that he had reviewed in detail the relevant clauses of the collective agreement with the help of CUPE's legal adviser, Gilles Giguère, to ensure that his grievance was worded properly. When questioned at length on this point, Mr. Levasseur maintained that the situation was too confused to be able to differentiate a termination and a lay-off and, assuming there had been a lay-off, persons with bumping rights within and between categories. He therefore had to obtain additional information from the employer before drafting his collective grievance, more specifically a new organization chart that would enable him to determine what had become of the positions in question in terms of the employees' bumping rights. Meetings between the employer and union representative Levasseur took place on May 14, 22 and 31, and three letters dealing with these questions were exchanged between the employer and the union. These letters are dated May 10, 13 and 22. Counsel for the employer, Mr. Laroche, also attended these meetings.

Mr. Levasseur and Ms. Verreault, who attended the first of these meetings, testified that there was a great deal of confusion among the employer's representatives regarding the new organizational context created by the restructuring of operations. Questions raised by the union went largely unanswered because the employer representatives themselves did not seem to be aware of the new division of duties or

the responsibilities of the management personnel that remained in place. According to Mr. Levasseur, the union tried to no avail to obtain a general picture of the company's situation in relation to its Canadian operations. An up-to-date organization chart, argued the union, would have enabled it to detail the nature of its complaints and its claims with regard to specific positions. According to Ms. Verreault, the employer's replies were very vague. As for the union's letters, the employer promised to respond but did not specify when. Mr. Levasseur testified to the same effect. After pointing out that the union's strategy was to generate meetings with the employer, he admitted that the employer had no clear position during these meetings. In his words, "No one said anything" (translation).

The union filed its collective grievance on June 5, 1991 after receiving from the employer a letter dated June 3 which specifically mentioned termination. According to Mr. Levasseur, this letter set in motion the union's response because it finally enabled him to draft a clear grievance. Moreover, the June 3 letter was especially important for the union because it established, at least in its mind, the specific point at which the 10-day time limit provided in the collective agreement began to run. This is the reason why the union admitted that it never seriously doubted that its collective grievance was timely until arbitrator Jutras declared it inadmissible on the ground that it had been filed outside the time limit. In fact, under the terms of the arbitral award rendered on April 19, 1993 following the second hearing held in this case, the arbitrator decided that the collective grievance was filed well beyond the 10-day time limit provided in the collective agreement. This time limit had expired on May 19, 1991.

In June 1991, after the collective grievance was filed, the parties exchanged letters. In these letters, the employer was already challenging the timeliness of the grievance. The union took note of the employer's objection in its letter of June 25, 1991 when it informed the employer of its intention to refer the grievance to arbitration, and

made the following comment: "As for your claim that we did not file the grievance within the specified time limit, please be explicit" (translation).

The grievance was heard at arbitration, by agreement of the parties, before arbitrator Jutras in two stages.

(a) An initial hearing was held on November 14, 1991 to deal with a preliminary objection raised by the employer, alleging that the lay-off procedure in the collective agreement (article 24) did not apply to terminations. The arbitrator handed down his award on December 20, 1991 and ruled that this was not the type of objection that precluded holding a hearing on the grievance.

(b) A second hearing was held in May 1992 and resumed at the beginning of September 1992. The arbitrator's award dealt essentially with the employer's preliminary objection concerning the timeliness of the grievance. In his award of April 19, 1993, arbitrator Jutras upheld the employer's timeliness objection and dismissed the collective grievance. This award gave rise to the complaints eventually filed with the Board.

II

THE PARTIES' ARGUMENTS

The complainants argued that, by May 9, 1991, it was clear that persons who were not members of the bargaining unit, or who had less seniority, occupied positions at the ticket counter or in the administration department. There was therefore no need, in their opinion, to delay filing a grievance. After May 19, 1991, any grievance was doomed to failure. Waiting as the union did until June 5, 1991 to file the grievance therefore constituted serious negligence that amounted to a breach of the duty of fair representation under section 37 of the Code.

Two of the complainants also alleged that their union did not take into account the arbitrator's comments, as they understood them in reading the arbitral award of April 19, 1993. The question of whether the complainants' individual letters could constitute grievances filed within the time limits was first raised during the hearing and discussed briefly between counsel for the employer and the union without consulting the complainants. The arbitrator again dealt with this question in his award. Clause 25.02 of the collective agreement gave the complainants the right to file a grievance. It specifically stated that any employee could file a grievance personally; it was up to the union then to ensure that the grievance and arbitration procedure was followed, as required.

In any case, counsel for the complainants argued that the judgment of the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, excerpts from which are cited below, required the union to show a minimum of competence in discharging its duty of fair representation. In conclusion, the complainants argued that the union did not discharge this duty in the present case.

The union, for its part, felt that it did not act arbitrarily. It submitted that it considered at length the difficult situation created by the restructuring of the employer's business. Its strategy of giving the collective grievance priority over individual grievances was adopted after careful thought and after trying to obtain from the employer the information needed to properly support its grievance.

The union argued that there was never any doubt that the June 3, 1991 letter marked the start of the time limit provided in article 25 of the collective agreement, and that the union's interpretation of the clause dealing with time limits was the correct one. According to Mr. Levasseur, only when the incident that gave rise to the grievance was clearly established must the time limit begin to run. In this case, this incident was the June 3, 1991 letter.

The union also argued that clause 25.02 of the collective agreement authorized the presentation of a grievance within 90 days following the incident that gave rise to the grievance where the employee, group of employees or the union did not become aware of this incident when it occurred. For this reason, the union never suspected that the grievance might not have been filed within the time limits provided in the collective agreement.

The employer, for its part, raised before the Board a preliminary objection to the effect that the complaints were inadmissible based on the time limits provided in section 97(2) of the Code for filing a section 37 complaint. The employer claimed that the complainants knew of the circumstances giving rise to the complaint well before the arbitral award of April 19, 1993. According to the employer, the complainants knew of the facts alleged against the union at the latest at the second hearing before the arbitrator where counsel for the union supported his evidence in this regard. The complainants attended this hearing and these dates were all well beyond the 90-day time limit imposed by the Code.

III

TIMELINESS

Before deciding the merits of the present complaints, the Board dismissed forthwith the employer's objection that the complaints are inadmissible because they are untimely. The time limits provided for filing a section 37 complaint are set out in section 97(2) of the Code:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

In accordance with this provision, the Board must determine the date on which the complainants knew or ought to have known of the facts and actions described in their complaints.

The Board believes that the complainants did not know of the facts that gave rise to the present complaints until April 19, 1993, the date of the arbitral award.

The Board rejects the employer's position that the hearing days should be considered the point at which the time limit provided for in section 97(2) of the Code began to run. The circumstances of the exchanges between counsel for the parties and the arbitrator were such that persons with no expertise in the field of labour law could not grasp all of the legal consequences. Moreover, the arbitrator states in his award that he considered this question a second time during his deliberations, when the complainants and counsel were not present. Finally, the Board accepts the version given by some of the complainants during their testimony that when the employer raised the question of time limits, Mr. Levasseur reassured them by insisting that there would be "no problem" and that the union would keep an eye on the situation.

The arbitrator was able on second thought to comment on the complainants' two letters. The union then decided not to treat the letters as grievances, and this, the complainants alleged, constituted one of the union's breaches of the duty of fair representation.

Consequently, the Board finds that the four complaints before it were all filed within the time limits provided in the Code, that is, within the 90 days following receipt of the arbitral award of April 19, 1993 (Peter Elcombe (1992), 88 di 222; and 17 CLRBR (2d) 294 (CLRB no. 953), pages 226-27; and 298; and Dave Mullin (1991), 84 di 74; and 91 CLLC 16,015 (CLRB no. 852)).

IV

DECISION

Section 37 of the Canada Labour Code provides that a trade union has the duty to represent fairly all employees in the bargaining unit for which it is certified:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The boundaries of this duty were described by the Supreme Court of Canada in Guy Gagnon et al., supra, the key decision on this question:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527; emphasis added)

In the instant case, the Board wishes to make immediately clear that it is dismissing forthwith the grounds of discrimination or bad faith. No one is accusing the respondent union here of acting in bad faith or in a discriminatory manner. The present case involves instead the notions of arbitrariness, serious negligence or the more precise concept of incompetence as these notions are defined in the case law.

Although not expressly mentioned in section 37 of the Code, the notion of incompetence, like the notion of serious negligence, is related to the more general notion of "arbitrariness." The notion of "serious negligence," moreover, has often been related to that of "arbitrariness":

"... Arbitrariness closely resembles serious negligence and is often confused with it. It is present, for example, where the actions of the certified association have no objective or reasonable explanation: blind trust in information provided by the employer; lack of consideration for the employee's arguments; or failure to determine whether they have any factual or even legal basis."

(Robert P. Gagnon, Collection du droit, Droit du travail, Vol. 3, (C.F.P.B.Q., 1993), page 144; translation)

Moreover, like any act or omission for which a union is criticized, incompetence is assessed in the light of the following factors: the nature or seriousness of the grievance, the characteristics of the bargaining agent (its resources and its experience) and the steps it took to discharge its statutory duty of representation (André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319), pages 226-230; 338-341; and 698-701).

It is well established that bargaining agents do not have to display the same level of competence as is required of professionals:

"It does not appear to me that an employee association is required to meet professional standards of competence. Otherwise, it would be required to have as its representative or business agent learned lawyers or graduates in industrial relations well acquainted with law and procedure, and above all with the constantly evolving case law in this field, which, moreover, is not easily accessible."

(Jacques Becotte, [1979] T.T. 231, page 237; translation; see also Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304), pages 323-324; 131; and 614-615)

Having said this, the Board believes that unions must still achieve a certain level of competence in order to avoid reckless or seriously negligent behaviour. The Board concurs in this regard with the following remarks of the Labour Court and the Superior Court of Quebec:

"... However, although the union will not be held to certain professional standards of competence in order to fulfil its role properly, there is a minimum that every union officer must know intuitively, even if this knowledge is not imparted to him explicitly. ..."

(Gérald Bilodeau, file no. 200-28-000048-91, December 12, 1991 (Que. L.C.), excerpt from the summary at page 66; translation)

"... A union has the right, indeed the duty, to assess a grievance's 'chances' at arbitration, but it must do so genuinely, objectively and with some competence, which is the case here."

(Syndicat des agents de la paix en services correctionnels du Québec c. Tribunal du travail et autres, [1993] R.J.Q. 2681 (S.C.), page 2689; translation; emphasis added)

The task in the present case, then, is to determine whether the respondent union, in handling the complainants' grievances, displayed incompetence and/or serious negligence in that its conduct should be equated with arbitrariness. To this end, the Board has very carefully examined the union's conduct from the moment the matter was referred to it until it actually filed the collective grievance which, according to the union, encompasses the complainants' individual grievances. The Board must recognize that, for the union, this period is critical because, once a strategy is adopted and the arbitration process initiated, the die is cast. The evidence does not in fact indicate any failing on the part of the union in terms of how it conducted itself in its preparation for, or its performance at arbitration.

Even the question raised by arbitrator Jutras as to how the union could have treated the individual letters, that is, as separate grievances, is of little help in the instant case. From the moment the union decides to file a collective grievance, it would be, to say the least, ill-considered, as counsel for the union, Mr. Larivière, explained during his testimony, to allege something else through individual grievances.

What then are the relevant facts in this case that shed the most direct light on the union's conduct and its decision-making process? Testifying on behalf of the union, Mr. Levasseur, its representative and person responsible for the file, stated that, under the collective agreement, it was very important for the union to know whether the employer's decision to cease most of its operations in Montréal and to keep in its employ people with little or no seniority should be treated as a termination or a lay-off, because the procedure set out in the collective agreement differed, in both cases. This explained, according to Mr. Levasseur, why he spent considerable time reviewing the relevant provisions of the collective agreement with the constant help of the union's legal adviser, Mr. Giguère. It is upon completing this analysis that the union finally decided that a collective grievance was the better route, having regard to all rights and interests of the members affected by the employer's decision.

The same thinking is apparent in the union's efforts to obtain information from the employer on the new organizational structure and the division of the remaining duties. The union decided to file the grievance only when the underlying situation was clearly defined and worded. This explains in part why the union did not file this grievance before June 5, 1991. The other explanation given by Mr. Levasseur is, as explained above, that the union was convinced that its interpretation of the clause in the collective agreement specifying the time limits for filing a grievance was the right one.

The obvious question that arises here is what happens if, through an unfortunate turn of events as did eventually occur here, the union misinterpreted the time limit clause. What then becomes of its duty of fair representation?

We wish to make it clear that this duty of fair representation cannot, nor must require a union to be infallible. The case law cited earlier clearly indicates that the union can make a mistake, provided this mistake is not the product of arbitrary, seriously negligent or discriminatory behaviour or of bad faith. In the present case, the Board must in fact determine whether, through conduct, the union displayed arbitrariness as this notion is defined by the case law or, more precisely, incompetence that can be equated with serious negligence.

Before answering this question directly, we must first note that, what is held against the union is that it had not filed the grievance within the specified time limit. This question is at the very heart of protecting the employees' rights conferred by the collective agreement. It is well known that failing to protect these time limits has very serious consequences for both the bargaining agent and the member or members involved: the bargaining agent no longer has access to the only available recourse against the employer on the rights which the employees allege have been prejudiced. In short, protecting a grievance is a prerequisite, and is the only means available to

a union to discharge its duty of representation with respect to questions arising under the collective agreement.

Notwithstanding the fact that this question is crucial to the management of collective labour relations, the Board has on occasion held that not filing a grievance within the time limits provided by the collective agreement was evidence of simple, not serious, negligence (Brenda Haley (304), *supra*). In other cases where the same failure was alleged, the Board concluded that the duty of fair representation had been breached (Réjean Lalancette (1990), 81 di 53; 14 CLRBR (2d) 80; and 91 CLLC 16,004 (CLRBR no. 802); Denis Pion et al. (1981), 43 di 254 (CLRBR no. 312); Brian R.M. Stevens (1989), 79 di 78; 7 CLRBR (2d) 117; and 90 CLLC 16,009 (CLRBR no. 769); and William McArthur (1988), 75 di 65; and 88 CLLC 16,053 (CLRBR no. 709)).

This clearly shows that everything depends on the particular circumstances in which this omission occurred, and the facts on which the union based its decision. Failure to observe the time limits still constitutes negligence in complaints of this type, but it is the circumstances in which this negligence occurred that determine whether or not the negligence is serious.

In the present case, the evidence clearly shows that at no time did the union believe that a question could be raised regarding the timeliness of its grievance, even though it recognized the ambiguity of certain relevant provisions of the collective agreement. Its interpretation of the relevant clause would protect it from any challenge in this regard — at least that is the impression that Mr. Levasseur's testimony left. Moreover, this interpretation assumed, as we saw, the information the union required would be provided by the employer, such as the new organization chart, before the time limits provided in the collective agreement began to run. This circumstantial evidence is particularly significant to the extent that it helps us understand the specific decision-making context in which the question of the time limits would eventually be raised. This decision-making context was in fact based on two assumptions that we

must now examine: first, the union's interpretation of the clause dealing with time limits was the right one; and, second, it was up to the employer to provide the union with information that would, in the end, determine when it could file a grievance.

The Board fully appreciates a certified bargaining agent's legitimate right to interpret a collective agreement clause in a manner that it believes is in its members' interests, even if other interpretations are possible. However, where time limits are concerned, it is not correct to say that all interpretations are equally valid, given that a bargaining agent's first duty is clearly to protect these time limits. In this specific context, it is much more important to adopt an interpretation that protects the nearest time limits than the "right" interpretation.

In the instant case, the evidence revealed that the union directed all of its attention to the correct wording of its grievance rather than on the problems that trying to obtain the missing information could have on the grievance's timeliness. From the outset, the union appears to have regarded its broad interpretation of the time limit clause as the right one. How else can one interpret the union's actions during the period immediately following the announcement of the shutdown of operations? Over and over again, the union reiterated its request for an organization chart and other information to be used in the drafting of the grievance, notwithstanding that it quickly became apparent, even to the union, itself who requested these meetings, that the employer representatives in attendance either knew nothing, or were unwilling to disclose what they knew. The union officials who testified all referred to the great confusion that reigned within the company regarding the new responsibilities of each employee, including management. In these circumstances, it was, to say the least, imprudent to leave in the employer's hands the decision as to when the grievance would be filed, particularly when this constituted the only avenue available to assert the employees' seniority rights.

There were, however, facts that could, or should, have alerted the union to the dangers of not filing its grievance as quickly as possible. The difficult negotiations that preceded the signing of the collective agreement in March 1991 should normally have increased the union's awareness of the risks involved in making the fate of its grievance depend with respect to timeliness on information the employer was obviously in no hurry to provide. Moreover, the extensive experience of the union representative, Mr. Levasseur, in labour relations matters should have been of some assistance to the union in assessing more realistically the employer's position on the issue of time limits. Furthermore, the union was assisted by its in-house legal adviser, Mr. Giguère, when it reviewed the collective agreement and analyzed its strategic options. In other words, it is difficult in the present case to argue that the union acted in good faith, albeit ineptly, because the employer had an edge in terms of labour relations expertise.

The truth is undoubtedly simpler. The union never gave the Board a coherent explanation of why it delayed filing its collective grievance, because there is none. The explanation given by union representative Levasseur, namely, that he was waiting for the employer to provide the clarification that he finally obtained in the June 3, 1991 letter, does not convince the Board. It is, at best, an after-the-fact or ex post explanation. The union simply did not address the question of time limits, convinced that it had ample time to file a grievance. As we saw, it focused all of its attention instead on the substance of the grievance and the additional information it thought it needed.

The union's behaviour is unusual. When confronted with a difficult situation where rights conferred by the collective agreement appear compromised, a bargaining agent first proceeds with all due diligence in filing grievances within the time limits, even if it means clarifying the wording or content at a later date. To do otherwise is to risk obtaining the perfect answer to a question that is no longer relevant because the time limit for raising the question has expired. This, unfortunately, is what happened here.

The union, in failing to address the question of time limits or, at the very least, in giving the broadest possible interpretation to this collective agreement clause, when simple caution required that it determine what was, according to all possible scenarios the nearest deadline, or that it ask the employer for an extension, was guilty of serious negligence. Before the union decided in this case, as it was perfectly entitled to do, to stake everything on the collective grievance, it first had to ensure that this grievance would be filed within the specified time limits, and not to take this for granted. This was all the more necessary because, by interpreting the time limit clause as it did, the union was for all practical purposes placing the fate of its grievance with regard to time limits in the employer's hands.

One has to wonder in fact what the union would have done had the employer not provided the termination explanation on June 3. This key information triggered, according to Mr. Levasseur, the filing of the grievance. Should the union have waited a little longer? How much longer? And if the information was still not forthcoming, should it have taken itself, against all odds, to file its grievance in a form that it still regarded as inadequate? To ask the question is to answer it. The comment made by arbitrator Jutras in his award concerning the union's insistence on obtaining the new organization chart says a lot about the fundamental problem with the union's approach to the matter: "is it not paradoxical that the exercise of rights conferred by a collective agreement would depend on a purely voluntary act by the employer?" (translation).

In adopting this approach, the union ran the very considerable risk of the time limit expiring, particularly in the circumstances of the instant case where collective labour relations had until quite recently been very strained. In the circumstances, the Board must conclude that the conduct of the union and its representative did not meet the requirements of the duty of fair representation defined by the Supreme Court of Canada in Guy Gagnon et al., *supra*. The Board readily admits that the situation was difficult, and that decisions had to be made quickly based on what in many instances was incomplete information. However, this is the reality of the world of labour

relations most of the time. It is, moreover, the main reason why unions always try to protect grievances from the outset, by filing more than less, because, once they have developed their strategy, they will have the option at a later stage of the grievance procedure to withdraw a particular grievance. In the instant case, Mr. Levasseur, acting on behalf of the union, did not follow this practice. In so doing, and having regard to the various circumstances described above, he was guilty of incompetence and serious negligence, thereby breaching the duty of fair representation defined in section 37 of the Code.

V

REMEDIES

Sections 99(1)(b) and 99(2) define the Board's remedial powers as follows:

"99. (1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(b) in respect of a contravention of section 37, require a trade union to take and carry on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on the employee's behalf or ought to have assisted the employee to take and carry on;

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an

employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

Since no arbitral award has yet been handed down on the merits of the collective grievance (Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330, page 1359), the Board orders CUPE to refer to arbitration, within 15 days of the date of the present decision, the collective grievance filed June 5, 1991 (Teamsters Union Local 938 et al. v. Gerald M. Massicotte et al., [1982] 1 S.C.R. 710). To this end, the Board extends the time limits provided in the collective agreement for referring a grievance to arbitration.

The Board orders the union to pay the legal fees and reasonable expenses that will be incurred by the complainants for the preparation and hearing of the collective grievance before the arbitrator, should they choose to be represented by independent counsel to defend their interests at arbitration. To this end, the Board orders the union to ensure that the grievance is processed as quickly as possible and to co-operate with the complainants and their counsel, if required.

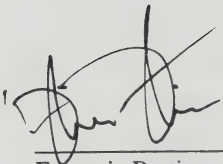
Should the arbitrator decide that all or some of the complainants must be compensated for the losses suffered as the result of being dismissed or laid off, the Board orders the union to compensate the complainants for damages for the period from the deadline for filing the grievance to the date of the Board's present decision.

The Board appoints Ms. Suzanne Pichette, director of its Montréal regional office, or any other labour relations officer she may designate, to assist the parties in implementing the present order.

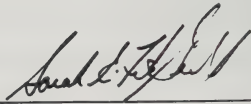
This is a unanimous decision of the Board.



Jean L. Guilbeault, Q.C.
Vice-Chairman



François Bastien
Member



Sarah E. FitzGerald
Member

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Summary

Bruce A. Cassman, *complainant*, and Canadian Union of Postal Workers, *respondent*, and Canada Post Corporation, *employer*.

Board File: 745-4525
CLRB/CCRT Decision no. 1087
October 28, 1994

Résumé

Bruce A. Cassman, *plaignant*, et le Syndicat des postiers du Canada, *intimé*, et la Société canadienne des postes, *employeur*.

Dossier du Conseil: 745-4525
CLRB/CCRT Décision n° 1087
le 28 octobre 1994.

An employee of Canada Post alleged in this complaint that his Union, the Canadian Union of Postal Workers, breached its duty of fair representation when it decided not to refer his dismissal grievance to arbitration. The respondent union argued that it had based its decision on the fact that the complainant was dismissed for fraudulently cashing a pay cheque belonging to another employee. The Union in this case was told one story by the complainant and a very different one by the employer.

The Board allowed the complaint on the grounds that the Union failed to conduct an investigation into the two very divergent stories prior to making a decision to abandon the grievance. The factors which were considered by the Board and endorsed by its jurisprudence were the seriousness of a dismissal, the experience and resources of the Union and the arbitrary manner in which the matter was handled.

Un employé de la Société canadienne des postes allègue, dans cette plainte, que le Syndicat des postiers a violé son devoir de représentation juste lorsqu'il a refusé de porter le grief de congédiement du plaignant en arbitrage. Le syndicat dit qu'il a pris cette décision après avoir appris que le plaignant avait été congédié pour avoir frauduleusement encaissé un chèque appartenant à un autre employé. L'employeur et le plaignant ont donné des versions très différentes des faits au syndicat.

Le Conseil a accueilli la plainte parce que le syndicat a omis d'enquêter sur les divergences considérables entre les deux versions de cette affaire avant de décider d'abandonner le grief. Pour en arriver à cette décision, le Conseil s'est inspiré de la jurisprudence du Conseil et a tenu compte de divers facteurs tels la gravité de la situation en raison du congédiement, l'expérience et les ressources du Syndicat, et la façon arbitraire dont il a traité cette affaire.

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Reasons for decision

Bruce A. Cassman,

complainant,

and

Canadian Union of Postal Workers,

respondent.

and

Canada Post Corporation,

employer.

Board File: 745-4525

Decision no. 1087

October 28, 1994.

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. Michael Eayrs and Patrick H. Shafer, Members. A hearing was held on June 16 and 17, 1994 in Toronto.

Appearances

Mr. Brian Dale, for the complainant;

Mr. David I. Bloom, assisted by Mr. Ken Cameron, for the Canadian Union of Postal Workers; and

Mr. Ian Szlazak, for Canada Post Corporation.

These reasons for decision were written by Mr. Patrick H. Shafer, Member.

I

This case deals with a complaint alleging that the Canadian Union of Postal Workers (the Union or CUPW) violated Section 37 of the Canada Labour Code.

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

Mr. Cassman (the complainant) alleges that on or about May 27, 1993, he was advised that the Union would no longer act on his behalf with respect to his discharge in 1991. He also complains that the Union failed to properly communicate with him about the circumstances giving rise to his grievance while it was being processed. The complainant requests that the bargaining agent fulfil its obligations under the Code and refer the matter to arbitration.

II

EVIDENCE

On May 27, 1991, the complainant presented himself at the office of Mr. Ken Cameron, Third Vice-President, (CUPW) Toronto Local. Mr. Cassman had with him a letter of dismissal signed by Mr. Doug Merchant, Manager, Transportation West, Canada Post Corporation (CPC or Canada Post). This letter dated May 24, 1991 made reference to an interview held on May 22, 1991 concerning the cashing of another employee's pay cheque. The letter also informed Mr. Cassman of his dismissal effective at the end of the shift on May 24, 1991. The reason for dismissal was "your cashing of the cheque of another employee."

The complainant described to Mr. Cameron the circumstances whereby he had received a pay cheque belonging to another employee, inadvertently signed this cheque and deposited it in his account. When the cheque was returned by his bank he returned it to Canada Post. He was interviewed with regard to the incident and subsequently dismissed as per the letter from Mr. Merchant.

Mr. Cameron was of the opinion, and expressed this to Mr. Cassman, that the employer's action was very heavy handed. He felt that he and Mr. Doug Merchant could solve the problem. He told Mr. Cassman that within the next week he would make a point of discussing this matter. He believed that a mistake had been made, that the cheque had been returned and that the complainant should not be dismissed under these circumstances.

Within one week of the May 27, 1991 meeting, Mr. Cameron met with Mr. Merchant at a regular grievance meeting. Mr. Cassman's case was not on the agenda, however as promised, Mr. Cameron raised the dismissal matter with Mr. Merchant who described how the cheque in question had been returned by Mr. Cassman stamped "Forgery-Falsifie" by the bank. He showed Mr. Cameron the document in question dated in November 1990 and returned in April 1991. He further described the meeting of May 22, 1991 where the matter was discussed with union representative, Mr. Darnbrough in attendance. He also described how Mr. Cassman read a prepared statement at this meeting and was reluctant to speak further on the record. According to Mr. Merchant, the complainant did make some admissions while the union representative was out of the room, with regard to signing the cheque, putting his account number on it and then crossing them out before the cheque was returned to CPC.

Mr. Cameron stated that he did have some concerns as a result of this meeting with Mr. Merchant. He was now aware that the cheque to the other employee was dated November 8, 1990. He was now aware that the cheque to Mr. Cassman and the cheque to the other employee were both pay cheques. He was also well aware that

an employee would not be in receipt of two pay cheques issued at the same time. He was concerned that the union representative, Mr. Darnbrough, had been asked to leave the meeting. He was also concerned that the story was very different from what he had been told by Mr. Cassman. Mr. Cameron confirmed with Mr. Darnbrough the essential parts of the meeting. He formed the opinion that no mitigating circumstances existed and he saw no reason to have the matter submitted to arbitration. He was now of the opinion that it would be a "sure loss". He testified that Mr. Cassman's story and the documentation from CPC did not jive, that this was not just a simple mistake and that since employees were in a "trust job," handling cheques all the time, that this could not be let go.

Mr. Cameron then discussed this matter with Mr. Dave Mitchell, the Regional Grievance Officer and the person responsible for the final decision as to whether or not this grievance would go to arbitration. This discussion took place near the end of June 1991 by telephone. Mr. Mitchell testified that he had received a call from the complainant enquiring into his grievance in 1991. In order to check into the matter, Mr. Mitchell then called Mr. Cameron at the local. He found that no file had been forwarded to the regional office for consideration. During their discussion, Mr. Cameron recounted his knowledge of the recent meeting and expressed his concern that this was not a good case and said that in his opinion, the union could not process this grievance. Mr. Mitchell, when asked by counsel, who would make the actual decision, stated that the regional office would. However, in the case of a discharge, the matter would be discussed with the local. By the end of the telephone conversation, it was decided not to proceed to arbitration since there were no technicalities to raise, and because the case was unlikely to succeed. The matter was never discussed with the complainant prior to or subsequent to the decision being made not to proceed to arbitration. In fact, Mr. Cassman was not informed of that decision until May 27, 1993.

The question concerning the procedure the Union follows in these instances was not well explained. In fact, there appeared to be no set policy with the exception that the final decision rested with the regional office. The Board was told that under normal circumstances, a file containing all relevant data concerning the grievance would be forwarded from the local to the region. A full discussion of the matter would follow, with the region then making the final decision. The region would then advise the local of the decision which would then in turn advise the grievor. In this case, it is quite obvious that no accepted procedure, policy or normal practice was followed in any way, shape or form.

The final action of interest concerned a letter dated October 16, 1991 from Ms. Joanne Leader, Second Vice-President, CUPW Toronto Local, to Mr. Cassman informing him that CUPW was waiting for his grievance to be scheduled for arbitration. Mr. Cameron testified that Ms. Leader would not have been aware of the decision taken not to proceed, a decision made some three months previous.

III

THE POSITION OF THE PARTIES

The Complainant's Position

1. Mr. Cassman had a previously unblemished record.
2. Mr. Cameron, when the matter was discussed, believed that this would be easily resolved based on the complainant's story. Mr. Cameron took the case to the employer and was given a totally different story. Based on the employer's version only, Mr. Cameron, in concert with the Regional Grievance Officer, Mr. Mitchell, who did not even have access to a file in this instance, decided not to bring the grievance to arbitration. In this instance, the Union which had access to substantial funds and could be considered quite sophisticated did not even go

to the trouble of looking into the matter. It did not communicate with the complainant in any shape or form. It simply assumed fraud and decided that the grievance could not succeed at arbitration.

3. In summary, there was failure on the part of the Union to follow its own procedures, or communicate with the complainant in gathering information prior to making a decision.
4. Since the decision was based solely on the employer's information and unsubstantiated assumptions, it can only be deemed to be an arbitrary decision on the part of the Union.

The Respondent Union's Position

1. It is clear that Mr. Cassman was dismissed for fraudulently cashing a pay cheque. This was not an innocent error. On November 26 he cashed two pay cheques, when in fact he could not receive two pay cheques at one time.
2. Mr. Cassman was very reluctant to answer questions at his interview, while his union representative was present.
3. When Mr. Cassman met with Mr. Cameron after the dismissal, he was not forthcoming with information as to the length of time involved. Mr. Cameron was very surprised to hear the real story. Mr. Cameron saw the two cheques and immediately doubted Mr. Cassman's version of the story. He was very concerned about the discrepancies.
4. Mr. Cameron called Mr. Mitchell, the Regional Grievance Officer, and based on his assessment of the case Mitchell decided not to proceed because the case had little chance of success at arbitration.

5. The Union suggests that if it had done a better job of communicating with the grievor, there would likely be no complaint. It was faced with certain facts, considered the facts and decided that chances at arbitration were poor. CUPW did however admit that it should have got some corroboration and more facts.
6. Basically there was a communication problem, but according to the Union, that does not amount to a violation of Section 37.

IV

THE LAW

The Board's role, with respect to complaints under Section 37 of the Code, is to look at the conduct of the union and its representatives and to determine if said conduct was arbitrary, discriminatory or if they acted in bad faith in representing an employee in the bargaining unit.

The criteria regarding a trade union's discretion whether to refer a grievance to arbitration are well defined in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; emphasis added)

It is made very clear that where a dismissal grievance is involved a much higher degree of diligence is expected from the trade union representations. As the Board said, in Brenda Haley (1981), 41 di 311; [1981] 2 Can CLRBR 121; and 81 CLLC 16,096 (CLRB no. 304), it is clear that:

"... they must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance."

(pages 324; 131; and 615)

In David Coull (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRB no. 957), the Board stated:

"In most of these duty of fair representation complaints where a grievance has been dropped, the answers to the question of whether section 37 of the Code has been violated lies in the testimony and credibility of the union officers involved. The key considerations are how they viewed the grievance, how they dealt with the grievor, the efforts they made to ascertain all of the relevant facts, how they dealt with the employer, the conclusions reached and, perhaps most important of all, the considerations and reasons for not proceeding with the grievance."

(pages 66; and 302-303; emphasis added)

This makes it very clear which steps must be taken to comply with the law. It is also very clear that only once these steps have been followed can a decision be finally taken.

In Robert Emard (1991), 85 di 190; and 16 CLRBR (2d) 59 (CLRB no. 883), after it had become quite clear that the union conducted no investigation into Mr. Emard's grievance before it decided not to proceed further, the Board concluded that:

"The manner in which the union processed the grievance was wholly superficial and constituted a breach of the duty of fair representation."

(pages 195; and 63-64)

It is in the light of these criteria that the Board intends to look at the conduct of the respondent union in the instant case.

V

DECISION

In this case, it appears quite straightforward that CUPW did not properly fulfil its role and did violate Section 37 of the Code.

The Union took Mr. Cassman's grievance and on the surface gave him every reason to believe that the problem could be resolved simply. It then went to the employer and received a very different version of the facts. At no time was Mr. Cassman asked to explain the differences in the stories nor was any other investigation carried out. The regional office, in response to a request from the grievor, called the local for some pertinent details. At that time even though the region had no file to examine, CUPW decided, following a brief discussion with the local and without further communication

with the grievor, not to proceed to arbitration. It is quite obvious, although evidence was given that there was no written policy on how to handle these matters, there was a normal practice, which was not followed.

The Board considers that the matter of lack of communication, although in itself usually not considered a violation of Section 37, is noteworthy. Had there been any communication with the grievor, this matter may well have been resolved early on. It is also a fact that had the proper file been in place and had the decision not to proceed been committed to the file, the grievance officer would have been able to convey this information to Mr. Cassman in October rather than telling him that the Union was awaiting an arbitration date.

For these reasons, the complaint is allowed.

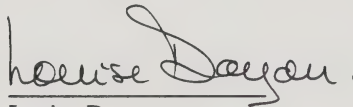
The Board therefore makes the following orders:

- that the Union immediately refer Mr. Cassman's grievance to arbitration;
- that the time limits with regard to referring a grievance to arbitration be waived;
- that the Union assume the legal fees and reasonable expenses that the complainant will incur with respect to the preparation and hearing of his grievance before the arbitrator;
- that the grievor be allowed his choice of counsel in the event he does not wish to be represented by counsel provided by the Union;
- that the Union co-operate with Mr. Cassman and his counsel to ensure that the grievance is heard as expeditiously as possible.

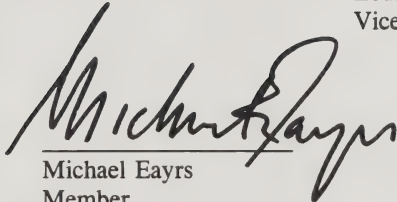
The Board further orders that should the arbitrator allow the complainant's grievance, the union shall be liable to pay any portion of monetary remedy (if any) granted by the arbitrator for the period commencing with the date it decided not to advance the grievance to arbitration until the date of this decision.

The Board retains jurisdiction to establish the actual amount in the event there should be a dispute between the parties with respect thereto.

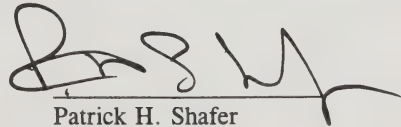
This is a unanimous decision.



Louise Doyon
Vice-Chair



Michael Eayrs
Member



Patrick H. Shafer
Member

Information

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Summary

Mark Conlin, *complainant*, and Canadian Union of Postal Workers, *respondent*.

Board File: 745-4637
CLRB/CCRT Decision no. 1088
October 31, 1994

Résumé

Mark Conlin, *plaignant*, et Syndicat des postiers du Canada, *intimé*.

Dossier du Conseil: 745-4637
CLRB/CCRT Décision n° 1088
le 31 octobre 1994

The complainant brought an application pursuant to sections 95(f) and (g) of the Code alleging discrimination by the union following his application for reinstatement.

The complainant had been expelled from the union following his participation in assisting a rival union to attempt a raid on the respondent. He argued that in refusing his readmission, the union had: (1) breached the terms of its own constitution; and (2) discriminated against him.

The Board reiterated that it was not empowered to interfere with the union's interpretation of its own Constitution.

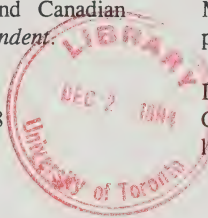
Although the Board had some initial concern over what appeared to be systemic discrimination, it nevertheless determined, on the basis of the evidence given by representatives of the union, that the union intended to favourably review the complainant's application following the present open period of the collective bargaining process. This fact, as well as the balance of evidence, satisfied the Board that it was no longer the policy of the union to automatically reject applications for readmission in similar circumstances to that of the complainant.

The plaignant dans cette affaire allègue que le syndicat a violé les alinéas 95f) et g) du Code en traitant de façon discriminatoire sa demande de réadmission.

Le syndicat avait expulsé le plaignant parce que ce dernier avait participé à des activités de maraudage entreprises par un syndicat rival. Le plaignant soutient qu'en refusant de le réadmettre, le syndicat: (1) a violé ses propres statuts et (2) a traité le plaignant de façon discriminatoire.

Le Conseil précise à nouveau qu'il n'a pas le droit d'intervenir dans la façon dont un syndicat interprète ses propres statuts.

Bien que le Conseil ait cru déceler, au début, de la discrimination systémique, il a néanmoins conclu, à la lumière de la preuve invoquée par les représentants syndicaux, que le syndicat avait l'intention de revoir la demande de réadmission du plaignant après la période d'ouverture du processus actuel de négociation collective. Ce fait, ainsi que les autres éléments de preuve, ont convaincu le Conseil que le syndicat n'a plus comme politique le rejet systématique des demandes de réadmission, dans des circonstances semblables à celles du plaignant.



The application was accordingly dismissed.

In its reasons, the Board confirmed its policy, as contained in Ronald Wheadon et al. (1983), 54 di 134; 5 CLRBR (NS) 192; and 84 CLLC 16,004 (CLRB no. 445), with respect to the interpretation given to sections 97(4) and (5).

La plainte est donc rejetée.

Dans ses motifs, le Conseil réitère sa politique énoncée dans Ronald Wheadon et autres (1983), 54 di 134; 5 CLRBR (NS) 192; et 84 CLLC 16,004 (CCRT n° 445), concernant l'interprétation des paragraphes 97(4) et (5) du Code.

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Reasons for decision

Mark Conlin,

complainant,

and

Canadian Union of Postal Workers,

respondent.

Board File: 745-4637

CLRB/CCRT Decision no. 1088

October 31, 1994

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. François Bastien and Patrick H. Shafer, Members.

Appearances

Mr. Mark Conlin, appearing on his own behalf;

Mr. Stuart Rush, for the respondent.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

The complainant, Mark Conlin, alleges that the respondent union, the Canadian Union of Postal Workers (hereafter "CUPW"), breached the provisions of sections 95(f) and (g) of the Canada Labour Code by denying him readmission into the union through the discriminatory application of its membership rules. Those sections provide that:

"95. No trade union or person acting on behalf of a trade union shall

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union; ..."

II

On August 15, 1990, Mr. Conlin was expelled from CUPW after the National Executive Board found that he had engaged in "raiding activities" contrary to article 8.01(d) of the union's National Constitution.

A brief history of the events leading to the expulsion is required for the purposes of this decision.

In 1988, the Board determined it appropriate to merge into a single bargaining unit various units of Canada Post employees, then represented by CUPW, members of the Letter Carriers Union of Canada (hereafter the "LCUC"), and several smaller employee associations. A vote was held in 1989 and CUPW won the bargaining rights over the LCUC. LCUC remains in existence, although it does not represent any employees in collective bargaining.

As might be expected, a number of the members of the LCUC were dissatisfied with the outcome of the vote and, over a period of time following the merger, worked to have the LCUC raid CUPW and replace it as the union representing the employees in the unit. Mr. Conlin was one of those employees.

In January 1990, the National Executive Board found Conlin guilty of engaging in raiding activities against CUPW by enlisting members to sign cards in the LCUC - which by then had been declared a "rival" organization by CUPW.

On February 10, 1993, following the suggestion of the CUPW Local Representative, Ms. Connie Edworthy, Conlin filed an application for readmission to the union. In his application he stated:

"Please accept this letter as my application for reinstatement, as a member in good standing, to the Canadian Union of Postal Workers, as per all of the applicable articles of the C.U.P.W. Constitution.

Accordingly, assuming that the Kelowna Local accepts this request, I ask that you forward this application to the National Executive Board for its' consideration in this regard.

I hereby give my commitment that, if accepted as a member in good standing, I will abide by the terms and responsibilities, as laid out within the C.U.P.W. Constitution.

I thank you for your assistance in this matter."

Kelowna Local 760 supported Conlin's application and applied, in its own right, to the National Executive Board to have Conlin readmitted to membership. All the necessary preliminary steps were taken by the complainant and Local 760 to comply with the Union's Constitution in order to ensure Conlin's request complied with Article 1.

The relevant sections of the Constitution provide as follows:

"Eligibility for Membership

1.04 Any employee who does not perform managerial functions is eligible for membership in the Union under the following conditions:

- (a) if he/she signs an application for membership card;*

- (b) *if he/she undertakes to comply with the Constitution and policies of the Union and the by-laws of his/her Local;*
- (c) *if he/she pays the initiation fee, subject to section 9.24;*
- (d) *if he/she is accepted by the Local.*

...

1.13 Any employee who has previously been a member in good standing of the Union may be readmitted as a member in good standing provided such employee complies with the provisions of section 1.04 and fulfils the other conditions which may be required by the Constitution or the Local.

1.14 When the employee requesting to be readmitted as a member in good standing had been expelled from the Union, such employee shall pay a readmission fee as determined by the Local; but this shall be at least \$40.00 and at most \$300.00.

1.15 A Local may, with respect to the readmission of an employee to member in good standing, impose any particular condition which it shall deem appropriate. When any particular condition is placed on the readmission of an employee to member in good standing, the entire case must be forwarded to the National Executive Board for revision or acceptance.

1.16 Subject to revision by the National Executive Board, readmission of an employee to member in good standing is left entirely to the discretion of the Local. However, the Local shall take into consideration the following factors:

- (a) *the reason for which the employee ceased to be a member in good standing;*
- (b) *the employee's attitude toward the Union and the Local prior to ceasing to be a member in good standing and since such employee ceased to be a member;*
- (c) *when the employee involved had been expelled, the seriousness of the grounds for such expulsion and all extenuating and aggravating circumstances, together with the period of time elapsed since the employee's expulsion."*

Notwithstanding the terms of the Constitution, and the fact that Local 760 supported the application, the National Executive Board nevertheless passed the following resolution on July 22, 1992:

"In accordance with Articles 1.15 and 1.16, the NEB has not accepted readmission of Mark Conlin of the Kelowna Local."

III

Mark Conlin brings the present application on two fronts:

1. That the application by the Kelowna Local 760 to have him readmitted to membership was carried out in compliance with the provisions of Article 1 of the Constitution, and, in denying that application for readmission, the Union's National Executive Board exceeded its jurisdiction as set out under the Constitution. Specifically, he argues that Articles 1.15 and 1.16 stipulate that the National Executive Board may **revise** or **accept** an application for readmission but not reject it, as was done in his case.
2. That, in refusing his application for readmission, the respondent Union discriminated against him because of his previous membership in the LCUC.

IV

With respect to the applicant's first argument, there is no need to detail the debate as to whether or not the relevant portions of the constitutional provisions quoted above require the union to accept the admission of a member when he has fulfilled the

conditions imposed by the Local Union. Here, it is clear that all the constitutional requirements, and all of the conditions imposed by Local 760, had been met. Notwithstanding this, the National Executive Board refused to readmit the applicant. Conlin argues that in doing so the National Executive Board was in breach of sections 1.13 and 1.16 of the Constitution.

However, although we have considerable sympathy for Conlin's argument, considering the relatively clear provisions of the Constitution, it is not for the Board to interpret these provisions. That responsibility is addressed in Section 4.26 of the Constitution which provides:

"4.26 The National President shall interpret the Constitution and his/her interpretation shall be upheld unless it is challenged and such a challenge is sustained by a majority of those voting in the National Executive Committee, National Executive Board or Convention."

Under the terms of the Constitution itself, the power of interpretation rests with the President. Although that exclusive power may well allow for some measure of abuse, it is nevertheless for the membership itself to review and amend its Constitution. The Board is not mandated to interfere in internal union matters, and this clearly includes the interpretation of the union's Constitution. In cases such as the present, the Board's authority extends only to ensuring that the terms of the Constitution are applied by the union in a manner that is free from discriminatory practices. See Paul Horsley et al. (1991), 84 di 201; and 15 CLRBR (2d) 141 (CLRB no. 861) upheld by Canadian Union of Postal Workers v. Paul Horsley et al. no. A-292-91, May 29, 1992 (F.C.A.); James Carbin (1984), 59 di 109; and 85 CLLC 16,013 (CLRB no. 492); Paul Dickinson (1993), 92 di 182; 22 CLRBR (2d) 53; and 93 CLLC 16,062 (CLRB no. 1029); and Claude Pilette v. Syndicat des Postiers du Canada [1991], R.J.Q. 1015 (Que.S.C.).

Although it is possible that inappropriate interpretations of the Constitution by the designated officer of the union may corroborate other evidence of discrimination, an adverse interpretation of the Constitution, on its own, will not be interfered with by the Board nor will it ordinarily lead, without further evidence, to the conclusion that the adverse interpretation was invoked simply to discriminate against a specific individual.

V

The Board heard considerable evidence which related to the complainant's second argument. A brief further comment on that evidence is warranted.

As indicated earlier, following the Board's order and the merger of the unions in 1989, there was an attempt, in 1990, to organize a raid application against CUPW by LCUC members. That raid was unsuccessful. However, it resulted in a number of employees, including Conlin, being expelled from the union for their raiding activities.

Although representations were made to secure a general amnesty for those members, the CUPW National Executive rejected that avenue of resolve in spite of its apparent reasonableness.

The unsuccessful raid by LCUC on CUPW was followed by another unsuccessful raid attempt on CUPW by the IBEW. The IBEW raid, for the most part, was supported by the same faction of union members who supported the earlier LCUC raid. This group included Mark Conlin.

It is apparent that there remains a considerable degree of animosity in the union's ranks between the "pre-1989" CUPW members and those who continue to support the

LCUC. It is against this backdrop of animosity and mistrust that the present application was brought.

VI

Perhaps the simplest way to approach the matter is to deal with the union's explanation of why Conlin's application, after having been supported by Local 760, was reversed at the National Executive Board level.

Dale Clark, the current 1st National Vice-President of the Union, testified that, although there had been considerable debate and support for a general amnesty to reinstate all of those who had been expelled from the union as a result of the LCUC raid, the National Executive Board instead adopted a policy to look at each case individually, on its own merit. According to Clark, that policy with respect to reinstatement was set out in a letter dated November 29, 1990, to Local Presidents and Secretary Treasurers from Darrell Tingley, then 1st National Vice-President, which stated, inter alia:

"...The following minimum criteria must be met for the NEB to seriously consider the request and locals should also consider section 1.16 of the National Constitution.

- *the individuals must have removed themselves from the conflict of interest;*
- *the individuals must not have actively worked against CUPW;*
- *the individuals must have demonstrated their willingness to be active, loyal members of the union;*
- *the individuals must publicly renounce any ties with the LCUC and accept the fact that they were in a conflict of interest;*

- *individuals, who have been expelled, must also pay a readmission fee of at least \$40.00 as per section 1.14, and abide by section 1.04 of the Constitution. ..."*

According to Clark, it was his obligation to review discipline imposed on members; and, in matters such as readmission, to ensure that the Constitution and policy of the National Executive Board were followed. He testified that after he received Conlin's application, he went through it carefully and obtained a copy of Conlin's disciplinary file to review his conduct since the initial expulsion. The review revealed that Conlin had been involved in not one but two unsuccessful raid attempts by rival unions. In the circumstances, he agreed with the National Executive Board's determination that Conlin's application should not be accepted at the present time insofar as, in his view, not enough time has elapsed since Conlin's expulsion, considering the severity of the offence and Conlin's subsequent action with respect to the IBEW raid.

Conlin, for his part, argues that he is a victim of systemic discrimination by the CUPW National Executive Board who had taken the position, in writing, that anyone involved in raiding activities would never be readmitted to the union. In support of his position, he made available to the Board a copy of a letter dated July 29, 1991, in which Darrell Tingley wrote, in reference to Conlin:

"In the event the above expelled person should apply for reinstatement or readmission to the local under section 1.13 and 1.14 of the National Constitution, it is important for your local to note that involvement in raiding activities on behalf of IBEW constitutes automatic rejection of such an application."

The above statement was preceded by an indication that the National Executive Board had evidence that led it to believe that Mark Conlin, although at the time expelled

because of his activities in assisting the LCUC raid referred to earlier, had also been involved in the raid by the IBEW on CUPW.

Conlin does not deny his participation in either the LCUC or the IBEW raids but asserts, as the evidence amply supports, that he has since become diligently supportive of CUPW and now wishes to play a more pivotal role in the union's organization. He argues that the statements in the above letter, combined with the National Executive Board's breach of the clear language of the Constitution, in failing to readmit him, established the necessary discrimination envisaged by section 95(f) and (g) of the Code.

Needless to say, the contents of that letter give the Board considerable pause in the circumstances of the present application. A discriminatory rule is exactly that: discriminatory. It remains so even if applied in a systemic or universal fashion. The mere application of a discriminatory rule is a *prima facie* basis for establishing a breach of the Code. See Terry Wilson, Paul Thibodeau et al. (1986), 66 di 201 (CLRb no. 583); and Daniel Joseph McCarthy [1978] 2 Can LRBR 105 (NSLRB).

In response, Clark acknowledged the existence of the letter of July 29, 1991, and the apparent blanket automatic rejection of any application which might be made by Mark Conlin. However, Clark was adamant that the statements made by Vice-President Tingley in that letter - although stating CUPW's policy at the "tail-end" of raids taken by the LCUC - are now no longer the policy of CUPW. He testified that there is no longer a blanket policy of refusing membership to LCUC employees involved in raiding activities against CUPW. Rather, in the circumstances, considering Conlin's adverse involvement in two raid applications, this application for reinstatement was refused simply because it was made too soon. Apparently, the National Executive Board wanted to see what Conlin's conduct would be during the 1994 open period in the collective bargaining process.

Clark testified that following the current round of collective bargaining negotiations, if Conlin's conduct remained consistent with that of support for CUPW, he was satisfied that the National Executive Board would view a new application from Conlin positively. He pointed to his letter of August 19, 1993, to Local 760 advising of the rejection of Conlin's readmission application. That letter states in part:

"This decision by the NEB does not preclude the Kelowna Local from submitting an application for readmission at a future date. It is my view that the present Board members will not be adverse to positively assessing continued evidence of Marks' activities on behalf of the membership. ..."

VII

The Board's policy in applications which allege a breach of section 95(f) and (g) has been clearly enunciated in a number of cases: James Carbin (492), supra; Ronald Wheadon et al. (1983), 54 di 134; 5 CLRBR (NS) 192; and 84 CLLC 16,004 (CLRB no. 445) upheld by Seafarers' International Union of Canada v. Ronald Wheadon et al. judgement rendered from the bench, nos. A-1777-83 and A-1778-83, June 5, 1985 (F.C.A.); and Paul Horsley et al. (861), supra. In reviewing its policy, the Board noted in Paul Horsley et al. (861), supra:

"...Clearly the mischief sought to be caught by these sections is discriminatory abuse of internal disciplinary powers. The Board is not to sit in appeal from decisions made by trade union disciplinary bodies. This was made clear by the Board in Ronald Wheadon et al. (1983), 54 di 134; 5 CLRBR (NS) 192; and 84 CLLC 16,004 (CLRB no. 445), where the Board expressed its view of what its role is in this type of complaint and set out what it expected from trade unions that were responding to complaints under these sections of the Code from their members:

'It should be made very clear that this Board is not an appeal body from internal union discipline. The role of the Board under section 185(g) [now section 95(g)] of the Code is to ensure that discipline standards, which includes the basis for

their application, the manner in which they have been applied and the results of their application, are free from discriminatory practices. In performing that task the Board shall not, as stated previously, apply a standard that would negate the informality provided for in the constitutions of some trade unions. What the Board does expect though, are realistic, human and plausible explanations from trade unions for their conduct.'

(pages 150; 209; and 14,036-14,037; emphasis added)

In the same decision, the Board also reviewed the standards it would be applying when dealing with complaints under sections 95(f) and (g). For our purposes here, it is only necessary to zero in on what is meant by 'discriminatory' in the context of these sections [quoting Terry Matus (1980), 37 di 73; [1980] Can LRBR 21; and 80 CLLC 16,022 (CLRb no. 211); pages 86; 32; and 588:

'...this Board endorses the criteria set down by Mr. Innis Christie, then Chairman of the Nova Scotia Labour Relations Board, when he said in Daniel Joseph McCarthy and International Brotherhood of Electrical Workers, [1978] 2 Canadian LRBR 105, at p.108:

"In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S. 1969, c.11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made". ...

(pages 146; 205; and 14,034)

Although the above quote refers only to membership rules, the rationale is equally applicable to the standards of discipline referred to in s.95(g). "

(pages 205; and 144-145; emphasis added)

VIII

We are satisfied from Clark's evidence that the automatic rejection "policy" set forth in Mr. Tingley's letter dated July 29, 1991, no longer applied to Conlin, or any other expelled member, at the time the complainant applied for readmission and that the National Executive Board's only concern was that Conlin conduct himself appropriately during the upcoming "open" period with respect to the CUPW collective agreement negotiations.

We left the hearing assured that following the 1994 round of bargaining, assuming that Conlin did not attempt to assist in another raid on the union during the open period - or otherwise act inappropriately with respect to the bargaining process - he would be reinstated upon application by Local 760. Similar dispositions could be expected for individuals similarly suspended or expelled.

In the circumstances, based on Clark's testimony, we have concluded that the union no longer has a systemic blanket policy of automatic refusal to its membership of LCUC members involved in the raid applications. We are also of the view that the union's conduct toward Conlin, considering: the basis for the application of its policy; the manner in which it was applied; and the appropriate results, in this case, simply **delaying** Conlin's admission to the union by six to eight months; are in fact free from discriminatory practices. The Board accepts the explanation of the union in the circumstances as being a realistic, human and plausible explanation for the trade union's conduct in refusing Conlin's application at that time, considering Clark's assurances concerning the outcome of a subsequent application.

As a result, Conlin's application is dismissed. However, we wish to make it clear that Clark's explanations were deemed acceptable in the circumstances because of our understanding that Conlin's application for readmission will be favourably reconsidered subject to his conduct during the current open period, as discussed.

In the event his application were refused by the National Executive Board, this Board would no doubt review its assessment of the existence of the systemic discrimination alleged by Conlin.

IX

Counsel for the union argued that we should re-examine and re-evaluate the Board's interpretation of sections 97(4) and (5) in its decision in Ronald Wheadon et al. (445), supra. He urged us to insist on the necessity for an applicant member to exhaust all his remedies, as contained in the union's Constitution, prior to being able to bring an application before this Board.

Section 97(4) of the Code provides:

"97. (4) Subject to subsection (5), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant first presented his grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint."

Section 97(4), however, must be read in conjunction with section 97(5):

"97. (5) The Board may, on application to it by a complainant, hear a complaint in respect of an alleged failure by a trade union to comply with paragraph 95(f) and (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure."

In Ronald Wheadon et al. (445), supra the Board stated:

"The Board respectfully disagrees with the position that it is mandatory to exhaust all avenues of internal appeal before coming to the Board. It is unrealistic to suggest that aggrieved persons must follow the complete process which, in some instances could lead to a convention floor at Miami some two years later, as a pre-requisite to access to the protection afforded by the Code. Not only could the expense of such a venture be formidable, the task of then being able to present a meaningful case to the Board after such a delay could be insurmountable."

(pages 145; 203-204; and 14,034)

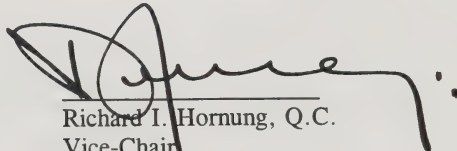
There is no need to review the Board's policy enunciated in Ronald Wheadon et al (445), supra. In our view, it remains sound.

To require members to wait for as long as two to three years in order to exhaust all their remedies for appeal via the union's Constitution would be unacceptable. To do so would ensure the remedies available to parties pursuant to section 95 of the Code were illusory rather than real. This is particularly so in the present case wherein the

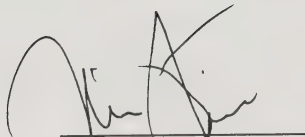
witness, Vince Skywork, testified that in his discussions with Mr. Berry, the Regional Representative of the Union, Berry advised him that if Local 760 appealed Conlin's decision, it would not be heard for at least three years until the next National Convention and that he, Berry, could not be certain that even if Conlin waited that long, his appeal would reach the convention floor. It is precisely this kind of problem that Ronald Wheadon et al (445), supra, and Paul Horsley et al. (861), supra, intended to address.

X

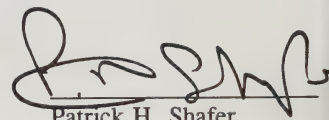
For the reasons set forth above, the application is dismissed.



Richard I. Hornung, Q.C.
Vice-Chair



François Bastien
Member



Patrick H. Shafer
Member

information

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Summary

Scott C. Montani, *applicant*, and Canadian National Railway Company (CN North America, *employer*).

Board File: 950-292
CLRB/CCRT Decision no. 1089
November 1, 1994

These reasons deal with the referral of a safety officer's decision to the Board under section 129(5) of the Canada Labour Code.

The applicant invoked his right to refuse dangerous work following the employer's refusal to assign a pilot conductor to assist a train crew, in spite of the applicant's allegations that the crew was inexperienced and unfamiliar with the territory.

The safety officer assigned to investigate the refusal came to the conclusion that there was no factual evidence to support the applicant's allegations that a dangerous work condition posed an immediate threat to the safety of the employee or the crew either at the time of the refusal or at the time of the safety officer's investigation.

When the Board hears an application for review of a safety officer's decision under section 129 (5) of the Code, it must enquire into the circumstances of the decision. It is governed by section 130(1) which limits the Board's jurisdiction to reviewing the safety officer's report.

Résumé

Scott C. Montani, *requérant*, et Compagnie des chemins de fer nationaux du Canada (CN North America, *employeur*).

Dossier du Conseil: 950-292
CLRB/CCRT Décision n° 1089
le 1^{er} novembre 1994

Les présents motifs portent sur le renvoi d'une décision d'un agent de sécurité au Conseil aux termes du paragraphe 129(5) du Code canadien du travail.

Le requérant a invoqué son droit de refuser d'effectuer un travail dangereux par suite du refus de l'employeur d'affecter un chef de train pour aider l'équipage, malgré l'allégation du requérant selon laquelle l'équipage n'avait ni expérience ni connaissance du territoire.

L'agent de sécurité chargé de faire enquête sur le refus a conclu qu'il n'y avait pas de preuve à l'appui de l'allégation du requérant selon laquelle des circonstances dangereuses posaient une menace immédiate à la sécurité de l'employé ou de l'équipage soit au moment du refus, soit au moment de l'enquête de l'agent de sécurité.

Lorsque le Conseil instruit une demande de révision d'une décision d'un agent de sécurité aux termes du paragraphe 129(5) du Code, il doit faire enquête sur les circonstances entourant la décision. Le Conseil est régi par le paragraphe 130(1) qui limite sa compétence à l'examen du rapport de l'agent de sécurité.

The Board found that the safety officer had fully considered all the relevant facts surrounding the work refusal, following investigation into the matter. The safety officer's role is not to determine the provisions of the collective agreement or the operating rules but to investigate and determine whether danger within the meaning of the Code existed. Considering all submissions in the matter of the July 15, 1994 work refusal, the no-danger decision issued by the safety officer is confirmed by the Board.

Although there is a finding of no danger, the concerns raised by the complainant are very valid concerns. Safety and health should not and must not be compromised by either employers or employees. The Board reminds the parties that under Part II of the Code, both **employees (section 126(1)) and employers (sections 124, 125 and 126(2)) have duties and obligations to take all reasonable and necessary precautions to ensure the safety and health of the employee, other employees and any person likely to be affected by the employee's acts or omissions.**

Le Conseil a jugé que l'agent de sécurité avait examiné tous les faits pertinents entourant le refus de travailler, par suite de son enquête. Le rôle de l'agent de sécurité ne consiste pas à examiner les dispositions de la convention collective ou les règles d'exploitation, mais bien à faire enquête et à décider s'il y a danger au sens du Code. Compte tenu de toutes les observations concernant le refus du 15 juillet 1994, le Conseil confirme la décision de l'agent de sécurité.

Bien que la décision stipule qu'il n'y a pas de danger, les préoccupations du requérant sont valides et méritent une attention particulière. Les employeurs et les employés ne devraient laisser aucune situation compromettre la santé et la sécurité. Le Conseil rappelle aux parties que, aux termes de la Partie II du Code, tant les **employés (paragraphe 126(1)) que les employeurs (articles 124, 125 et paragraphe 126(2)) sont tenus de prendre toutes les précautions nécessaires et raisonnables pour assurer la sécurité et la santé de l'employé, des autres employés et de toute autre personne susceptible d'être touchée par les gestes ou la négligence de l'employé.**

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Reasons for decision

Scott C. Montani,

applicant,

and

Canadian National Railway Company (CN
North America,

employer.

Board File: 950-292
CLRB/CCRT Decision no. 1089
November 1, 1994

The Board was composed of Ms. Mary Rozenberg, Member, sitting as a single member panel pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on September 29, 1994, in Toronto.

Appearances

Mr. William Armstrong, Safety Officer, Transport Canada;

Mr. J. H. Houston, Brotherhood of Locomotive Engineers Ontario Chairman representing the complainant, Mr. Scott Montani; and

Mr. Kenneth R. Peel, Counsel for CN and Mr. Sante Iatonna, Adviser.

These reasons for decision were written by Ms. Mary Rozenberg, Member.

These reasons deal with the referral of a Safety Officer's decision to the Board under section 129(5), Part II of the Canada Labour Code (Occupational Safety and Health). The referral arose from a refusal to work exercised by an employee of Canadian National Railway on July 15, 1994, and the Safety Officer's subsequent finding of "no danger".

The applicant, Mr. Montani, invoked his right to refuse dangerous work upon learning at a briefing session that he had been assigned to work as a locomotive engineer on the Hamilton Bronte Industrial switcher, with a crew that was inexperienced and unfamiliar with this territory. In Mr. Montani's opinion, working with a crew unfamiliar with the physical characteristics of the Oakville subdivision and the adjacent industrial spurs created a condition that posed a danger to himself, the other members of the crew, the train, the communities, the sidings, the company's customers and its business interests.

The Facts

The facts of the case and the events that led to the referral to the Board are described below.

Mr. Scott Montani began working for CNR on February 12, 1988. He qualified as a locomotive engineer on January 1, 1993. He works regularly as a conductor or brakeman in a joint spare board and as a locomotive engineer for emergency relief service.

On July 15, 1994, Mr. Montani was given his second assignment as a locomotive engineer. During the mandatory routine job briefing¹, which is conducted at the commencement of each train assignment, Mr. Montani learned that the trainman had not worked on the Hamilton-Bronte line during the past four years, and that the other crew member, the conductor, had worked the line only once, but not as a conductor

¹During the job briefing, each crew member exchanges information. The crew plans the briefing; reviews the assignment; reviews emergency procedures (fire safety, emergency telephone and first aid); reviews bulletins; assigns responsibilities; confirms each other's understanding of who performs what, how and when. If the (expected) situation changes, an additional briefing is held. Crew are advised "DON'T TAKE SHORTCUTS".

and not during non-daylight hours. Mr. Montani stated that the crew members told him that they did not feel confident about this assignment.

The crew communicated with the Crew Management Center. The conductor requested a pilot conductor² to accompany the crew on the train. The request for the pilot was turned down by the Yard Master, who according to Mr. Montani, based his decision on the provisions of the collective agreement. Mr. Montani then immediately advised the Yard Master, his immediate supervisor, that he was invoking his right to refuse under section 128 of the Code. This refusal occurred at approximately 19:50 hours.

At approximately 20:10 hours, the Yard Master telephoned Mr. Iatonna, Manager of Train Services, at his home. Mr. Iatonna has held this position since 1985. The Yard Master advised Mr. Iatonna that a conductor's request for a pilot had been refused and that the locomotive engineer, Mr. Montani, had subsequently invoked a work refusal. Mr. Montani was at the Health and Safety Office at the time of this conversation.

Mr. Iatonna called the Health and Safety office to speak to Mr. Montani. Mr. Montani explained to Mr. Iatonna that he felt it was unsafe to work with the assigned conductor and trainman. Mr. Iatonna informed Mr. Montani that a pilot conductor would not be assigned to the crew. According to Mr. Iatonna, the assigned crew was qualified, experienced and familiar with their positions and with the Canadian Railway Operating Rules, which, if followed properly, protect against accidents. Mr. Iatonna felt that the assignment was safe. He further advised Mr. Montani that the crew should use extra caution, comply with all rules, reduce their speed and take the time they felt necessary. Mr. Montani did not agree with this advice, nor did he accept

²"Pilot" applies to an employee assigned to a train when the locomotive engineer or conductor, or both, are not fully acquainted with the physical characteristics or rules of the railway over which the train is to be operated. (Defined in Canadian Railway Operating Rules section 8(d)).

these suggestions. Mr. Iatonna then advised Mr. Montani that he did not think this refusal was a safety issue, and that he should get back to work. Mr. Montani responded that he maintained his refusal and asked Mr. Iatonna if he was denying him his right to refuse. Mr. Iatonna replied "no", and the telephone conversation ended.

Mr. Iatonna arrived at the Hamilton yard Safety Office shortly after 21:00 hours. All three crew members were there. Mr. Iatonna contacted the Crew Management Center and requested that Mr. Lucas, a union representative on the Health and Safety Committee, be relieved of his assigned duties for an investigation of a work refusal. Mr. Lucas arrived at the yard Safety office at approximately 21:50 hours.

Mr. Montani's safety concerns were discussed, and Mr. Iatonna reviewed the track diagrams³ with Mr. Montani and the other members of the crew. Mr. Iatonna felt that both the conductor and the trainman were qualified and experienced and that since all of Mr. Montani's concerns were covered by the operating rules, these were conditions inherent in the work.

Mr. Iatonna asked again if Mr. Montani was prepared to work his assignment. Mr. Montani maintained his refusal. He stated that the track diagrams were incomplete and misleading since they showed derails in some locations and not in others. Mr. Montani explained that he was prepared to work the assigned crew up to Burlington West. However, he felt that beyond that point, working with a crew inexperienced and unfamiliar with the territory, would put his safety at risk, since the territory had changed and signals had been relocated. Mr. Iatonna asked Mr. Montani if he could act as the pilot for the conductor, since he was familiar with the territory. Mr. Montani replied that he could not do both the locomotive engineer's and the pilot

³Track diagrams detail information such as the trackage route, street names, main trackage, side trackage, grades, sidings, derails, substations, industrial spurs and customer locations. Each is identified with mileage. Each diagram gives maximum speed limits through the various sections of track.

conductor's work. Mr. Lucas, the union representative, agreed with Mr. Montani that there was an unsafe condition.

There was an impasse. Mr. Montani continued to exercise his right to refuse under the Code. Mr. Iatonna telephoned Transport Canada and requested that a Safety Officer be assigned to investigate the work refusal. Mr. William Armstrong was given the assignment.

The Safety Officer's Investigation

Mr. Armstrong arrived in Hamilton shortly after midnight and convened a meeting in the Hamilton yard office building conference room to investigate Mr. Montani's work refusal. Mr. Montani, Mr. Lucas and Mr. Iatonna attended the meeting.

During this investigation, Mr. Armstrong received confirmation that the employer had investigated Mr. Montani's refusal in accordance with section 128(7) of the Code, in the presence of the employee and a member of the local Safety and Health Committee.

To ensure that those participating in the investigation understood the meaning of dangerous condition as defined in the Code and the role of a Safety Officer when conducting an investigation into a right to refuse situation, Mr. Armstrong reviewed section 128(1), Part II of the code.

Mr. Armstrong is familiar with the railway industry and knows the Oakville Subdivision. At the hearing, he explained in detail various safety features such as: significance of being A-carded; purpose of job briefings (initial and ongoing); automatic signal systems; walk the train inspections; crew communications; and assignment instructions.

In the course of his investigation, Mr. Armstrong examined the track diagrams, enquired about the qualifications and experience of the two employees that

Mr. Montani refused to work with. Mr. Iatonna advised Mr. Armstrong that the two individuals were 'A-carded' (which meant that they were qualified, licensed, and certified according to the Canadian Railway Operating Rules); that both the conductor and the trainman were fully qualified and experienced employees in their positions who had voluntarily exercised their seniority to work out of Hamilton. Mr. Iatonna further explained that under the terms of the UTU collective agreement, where employees voluntarily exercise seniority to work at another terminal, they are required to familiarize themselves with the territory they will be working.

The method of train control in the Oakville Subdivision is interlocked with an automatic signal system where a Rail Traffic Controller (RTC), controlled by a central traffic control system, controls the signals and the power switches; all train movements are made on the basis of this signal system which governs the speed of movement over and within the subdivision. The automatic signal system covers only the main tracks and trains coming out of the sidings to the main track. The system does not cover the industrial spurs. However, prior to a train moving, the conductor and trainman "walk the train" to ensure movement is safe (i.e. ensure that the switching operations are safe, check brakes to ensure braking capacity, do brake tests, check for debris on the rails and under the cars). Crew members must also conduct ongoing briefings⁴ in the field as their work progresses. They have a switch list which indicates which cars to switch, pickup and/or dropoff. Switching instructions among crew entail an end to end communication system either through hand signals or radio (99% radio). Radios must be tested before the train leaves the yard. No train movement is made until an inspection of cars and equipment is completed, and then are declared safe. (Dangerous) situations which may arise and what to do in such

⁴During these briefings, the crew is to discuss the sequence of job steps; check tools and equipment before using them; point out potential hazards; ensure that protective equipment is available and used properly; review emergency procedures; review the responsibilities of each employee; confirm understanding of instructions; follow-up. Again additional briefings are held as the work progresses or the situation changes. Crew are again advised "DON'T TAKE SHORTCUTS".

situations are covered in training. Trackage information is provided to crews. Signs are posted in the industrial spurs.

Mr. Armstrong knew that the crew had received CNR training and were experienced. The conductor was hired in 1991 in Niagara Falls; the trainman had exercised his seniority from Sarnia (Petro Chemical Valley) and had knowledge and experience in handling dangerous commodities and in switching. Both had exercised their seniority to bid into the Hamilton-Bronte area. Mr. Armstrong knew that Mr. Montani was also fully qualified and experienced and that he was familiar with the Oakville Subdivision area, switching industrial spurs and with the type of work involved.

Mr. Armstrong came to the conclusion that there existed no factual evidence in support of Mr. Montani's allegations that a dangerous condition posed an immediate threat to the safety of the employee(s), either at the time of the refusal or at the time of the Safety Officer's investigation.

Upon receiving Mr. Armstrong's decision with respect to his work refusal, Mr. Montani stated that he was surprised by the decision, given the results of a previous incident, and that he took exception to the Safety Officer's decision. Mr. Montani left the room immediately saying 'I have to go, I have work to do'.

At the time of his investigation, Mr. Armstrong was not aware that the conductor had three rail assignments over the Oakville territory during the previous month and that the trainman had covered the Oakville territory forty-three times between 1989 and 1990. This information came to light during this inquiry. Mr. Armstrong indicated that this additional information would have only strengthened his findings.

Mr. Armstrong advised that he did not consider whether or not the presence of a pilot conductor was a necessary component in his investigation or assessment of the existence of danger at the time of the work refusal or of his investigation. He focussed

on whether or not there existed a danger to Mr. Montani and the crew, as contemplated by the Code.

Mr. Armstrong did not know whether or not the conductor and/or the trainman exercised their right to refuse. He did not conduct any other section 129(1) investigations at this location that involved the assigned trainman or conductor.

Mr. Armstrong advised the parties in writing of his decision in a letter dated July 27, 1994. His letter confirmed the decision he had previously communicated to the parties. Mr. Montani decided to appeal the Safety Officer's decision and requested that Mr. Armstrong refer his decision to the Board in a letter dated August 2, 1994.

The Parties Submissions

Mr. Montani's representative acknowledged at the hearing that there was no danger at the time of Mr. Montani's refusal. He submitted however that there is an obligation on the company and on employees to take every precaution for protection and to avoid taking unnecessary risks in the performance of their duties. He submitted that the company was courting disaster when it wouldn't send out a conductor pilot, knowing that the majority of the crew on train no. 556 were unfamiliar with the territory to which they had been assigned.

The union asked the Board to consider the following in rendering its decision. The Hamilton-Bronte route is a highly populated area. The Oakville Subdivision and adjacent spurs are a very busy subdivision for freight and passenger train movements. Train no. 556 had a night time assignment. Two of the crew members were not familiar with the trackage east of Burlington and were not familiar with the industries involved. The various train no. 556 assignments involved oil refinery, derailis, significant grades, reverse movements, curvatures, no crossing protection, crossings available where emergency crossings could not be blocked, environmental concerns with population and water supply at potential risk. The diagrams supplied to the crew

members were inconsistent and outdated. Given the nature of the assignment, the switching requirements and the crew's unfamiliarity with the territory, Mr. Montani properly invoked his right to refuse under the Code. He did this in the interest of his safety, the safety of his fellow employees and the safety of the community.

The representative requested that the Board rescind the safety officer's decision and that the company be instructed to adhere to a strict compliance of the Canadian Railway Operating Rules, in particular rule 106.

Counsel for CNR asks the Board to reaffirm the safety officer's decision because it is correct in the circumstances. The safety officer has to determine whether there is danger or not. Mr. Armstrong correctly apprehended his jurisdiction and he understood his task. The crew on train no. 556 had not yet covered the territory in question when Mr. Montani invoked his right to refuse. The complainant never articulated the precise danger said to exist. He expressed concern only with the potential for danger and the possibility of injury. The kinds of situations which Mr. Montani referred to as potentially happening are within the normal working conditions and usual operation of the train. In carrying out their work assignments, the crew members must exercise caution and obtain clearances in accordance with the operating rules. The safety officer gave consideration to this. He also gave fair and appropriate consideration to the training, qualifications and experience of each of the crew members. He considered the purpose of the job briefing, and its use for communicating information at the start of each assignment, and on an ongoing and as-needed basis, as well as the responsibilities and obligations of each of the members of the crew to pass on all necessary information and to comply with the operating rules.

The Law

When the Board hears an application for review of a safety officer's decision under section 129 (5), it is governed by section 130 (1) of the Code which stipulates that the Board's jurisdiction is limited to reviewing the safety officer's report. There is no general power for the Board to go beyond this.

When the Board receives a referral of a safety officer's decision, it must place itself in the shoes of the safety officer and enquire into the circumstances of the refusal and the safety officer's reasons for concluding that danger to the employee did not exist. As such, there is a requirement for the Board to analyze the safety issue which was the subject of the work refusal. The Board's role is not to determine whether the employee was right or wrong, but to investigate the problem that was identified by the employee and to assess whether the potential for danger or the risk of injury was so acute that corrective measures needed to be taken before the employee could safely perform his work duties. The Board must assess whether or not there existed a danger to Mr. Montani.

The concept of danger is defined in section 122 (1) of the Code as follows:

"122. "danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected;

Section 128 (1) states:

128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

Section 128 (2) states:

"(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment."

The Board has stated that Parliament did not intend to deal with danger in the broadest sense of the word. See David Pratt (1988) 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686). Danger within the meaning of the Code must be perceived to be immediate and real. The risk to the employee(s) must be serious to the point where the machine or thing or the condition created may not be used until the situation is corrected. Also, the danger must be one that Parliament intended to cover in Part II of the Code.

The right to refuse is an emergency measure. It is to be used to deal with situations where employees perceive that they are faced with immediate danger and where injury is likely to occur right there and then. It cannot be a danger that is inherent in the work or that constitutes a normal condition of work. Nor is the possibility of injury or potential for danger sufficient to invoke the work refusal provisions; there must in fact be danger. See Stephen Brailsford (1992), 87 di 98 (CLRB no. 921) and David Pratt, supra. Nor is the provision meant to be used to bring labour relations issues and

disputes to a head. Where such refusals coincide with other labour relations disputes, the Board will pay particular attention to the circumstances of the refusal. See Stephen Brailsford, (*supra*), Ernest L. LaBarge, (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no.357) and William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332).

The Board recognizes that there is a certain degree of danger that exists in most occupations and that the risk of injury varies from industry to industry. The Board must therefore ask whether the situation that the safety officer did not see fit to characterize as a danger does in fact constitute a normal aspect of work for a given job (assuming that this work does not entail a risk prohibited by the Code). See Ernest L. LaBarge, (*supra*) and François Lalonde (1989), 77 di 9 (CLRB no.731).

The Decision

Mr. Montani did not identify any specific danger. He only spoke of a potential or possible danger because a pilot conductor was not provided to assist the crew of train no. 556. This type of danger constitutes a hypothetical situation that is not contemplated within the meaning of danger in the Code.

When Mr. Montani invoked his right to refuse, the train had not moved. It had not moved when the Safety Officer completed his investigation, nor had it moved before the Safety officer rendered his decision.

Mr. Armstrong considered the composition of the train no. 556 crew. All three employees, the locomotive engineer, the conductor, and the trainman were all "A-carded". They all were qualified and experienced in their respective assigned positions. One of the three, Mr. Montani, was familiar with the Oakville territory and the adjacent industrial spurs.

One can reasonably infer that had either the trainman or the conductor exercised their right to refuse under the Code. Mr. Armstrong or another Safety Officer would have conducted investigations into those refusals. Mr. Armstrong did not conduct any other section 129(1) investigations at that location on that night involving the conductor or the trainman. Nor was he aware that any other Safety Officer had done so. An investigation by the Board indicates that the Board has not received at this time any other referrals of Safety Officer's decisions related to this situation. In the absence of any such investigation, or referrals, one can reasonably conclude that neither the conductor nor the trainman exercised their right to refuse on that assignment or on that night. Only Mr. Montani did so.

In arriving at his decision, Mr. Armstrong gave consideration to the immediacy of the alleged dangerous condition perceived by locomotive engineer Montani; to the fact that the danger must be actual and evident and that it must be present at the time the employee refused and at the time of the Safety Officer's investigation. The safety officer's role is not to determine the provisions of the collective agreement or the operating rules but to investigate and determine whether danger within the meaning of the Code existed.

The Board finds that the Safety Officer fully considered all relevant matters and facts surrounding Mr. Montani's work refusal, in the course of his investigation into the matter. The Safety Officer's role was not to determine the provisions of the collective agreement or the operating rules. His role was to investigate and determine whether danger within the meaning of the Code existed for Mr. Montani and the crew. Considering all of the submissions in the matter of Mr. Montani's work refusal on July 15, 1994, the no-danger decision issued by the safety officer is confirmed by the Board.

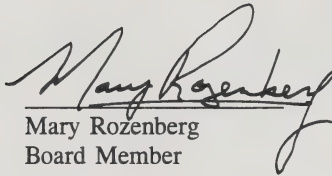
Although there was a finding of no danger in this instance, the concerns raised by Mr. Montani are very valid concerns. Safety and health should not and must not be compromised by either employers or employees. The Board reiterates what it said in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686):

"...because a safety officer or the Board finds that there is no immediate danger to an employee and that the operation can resume, it does not mean that danger in the strict sense of the word does not exist at all. There may still be reason enough for the circumstances to be investigated further through the safety and health committees or representatives with a view to reducing the risk of injury or illness ... into the long-term effects of the hazard or condition that caused the employee's anxiety in the first place."

The Board reminds the parties that under Part II of the Code, both **employees** (section 126(1)) and **employers** (sections 124, 125 and 126(2)) **have duties and obligations to take all reasonable and necessary precautions to ensure the safety and health** of the employee, other employees and any person likely to be affected by the employee's acts or omissions.

During the inquiry Mr. Montani, the Safety Officer and Mr. Iatonna made reference to a Crawford work refusal, a previous similar refusal. In addition, at the conclusion of argument, Mr. Montani's representative asked to have the right to make post-hearing submissions with regard to the Crawford case which was then under review and for which a decision was expected at any moment. The Board advised that it did not have jurisdiction to investigate or deal with that work refusal; that the decision reached in that situation would be based on the facts of that case; and that the decision reached in this refusal would be based on the evidence in this case.

Furthermore and most importantly, the Board is obliged to deal with the decision in light of the submissions made at the hearing as expeditiously as possible, and as a result the Board will not consider any post-hearing submissions.



Mary Rozenberg
Board Member

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Summary

Westcan Bulk Transport Ltd., *complainant*,
and Miscellaneous Employees, Teamsters
Local 987 of Alberta, *respondent*.

Board File: 745-4631
CLRB/CCRT Decision no. 1090
November 10, 1994

Résumé

Westcan Bulk Transport Ltd., *plaignant*, et
section locale 987 du syndicat des Teamsters
en Alberta (Miscellaneous Employees),
intimée.

Dossier du Conseil: 745-4631
CLRB/CCRT Décision n° 1090
le 10 novembre 1994

The employer brought a complaint, pursuant to section 97 of the Canada Labour Code (Part I - Industrial Relations), alleging that the union, during an organizing campaign at the employer's work place, breached sections 95(d) and 96 of the Code.

Prior to the scheduling of a hearing the union withdrew its certification application. The employer nevertheless insisted on proceeding.

The Board reviewed its policy and jurisprudence with respect to the granting of remedies pursuant to section 99 of the Code. In addition, it reviewed its policy and practice with respect to dealing with issues that were moot. The Board determined that, in the circumstances, the issue between the parties was moot and the complaint was dismissed.

L'employeur a déposé une plainte en vertu de l'article 97 du Code canadien du travail (Partie I - Relations du travail), alléguant que le syndicat, au cours d'une campagne de recrutement dans les locaux de la compagnie, a enfreint l'alinéa 95d) et l'article 96 du Code.

Avant que l'affaire soit mise au rôle, le syndicat a retiré sa demande d'accréditation. L'employeur a toutefois insisté pour que sa plainte soit entendue.

Le Conseil a passé en revue sa politique et sa jurisprudence concernant les redressements accordés aux termes de l'article 99 du Code. Il a également passé en revue sa politique et sa jurisprudence concernant les questions d'ordre théorique. Le Conseil a jugé que, dans les circonstances, la question opposant les parties était sans intérêt pratique et a donc rejeté la plainte.



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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada

Labour

Relations

Board

Conseil

Canadien des

Relations du

Travail

Reasons for decision

Westcan Bulk Transport Ltd.,

complainant,

and

Miscellaneous Employees,
Teamsters Local 987 of Alberta,

respondent.

Board File: 745-4631
CLRB/CCRT Decision no. 1090
November 10, 1994

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Calvin B. Davis and Ms. Sarah E. FitzGerald, Members.

Appearances

Mr. Murrey Dubinsky, Q.C., for the complainant; and

Mr. Duncan Irvine, for the respondent.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

The Employer filed a complaint, pursuant to section 97 of the Code, alleging that the Union had breached sections 95(d) and 96 of the Code.

II

On August 24, 1994, the Union filed an application for certification for a unit of the Employer's employees as follows:

"all employees of Westcan Bulk Transport Ltd., employed in the City of Calgary excluding supervisors and other employees excluded by the Code."

On October 8, 1993, the Employer brought the present complaint. According to the Employer, the Union, without its consent, conducted an organizing drive at the employer's workplace and during working hours. In addition, the Employer alleged that the Union threatened or coerced certain specified employees to induce them to become members of the trade union.

At the time the complaint was filed the Employer requested the following remedies pursuant to section 99 of the Code:

1. a cease and desist directive; and
2. an order dismissing the union's certification application.

On October 22, 1993, the Union withdrew its certification application. Notwithstanding this withdrawal, the Employer nevertheless insisted on proceeding with the present complaint.

After a series of adjournements, the matter came before the Board in Calgary on October 18, 1994.

III

At the commencement of the hearing Counsel for the Union brought a preliminary motion questioning the Employer's status to bring the present complaint. He argued that insofar as the conduct of which the Employer complained revolved around the organizing campaign; and insofar as the certification application was withdrawn; the remedies requested by the Employer were no longer available in the circumstances. Essentially the Union's position was that with the withdrawal of the certification application, the interests of the Employer in the present complaint were obviated and the Employer is therefore no longer an interested party. As a result, according to the Union, the Employer lacked the necessary standing before the Board to proceed with the present complaint.

For our purposes, it is not necessary to deal in depth with the Union's preliminary motion except to say that, in light of the provisions of sections 97, 95(d) and 96 of the Code, the Board advised the parties that the Employer had the necessary standing to bring the complaint and appear before the Board pursuant thereto.

However, the preliminary motion was nevertheless significant for our purposes in that, during the course of argument thereon, important facts and admissions came to light with respect to the substantive aspects of the case. In particular, Counsel for the Employer indicated that the original remedies sought by the Employer were no longer being pursued. And, that there was no other remedy which the Employer requested or could recommend that the Board should order if it decided that a breach of either section 95(d) or 96 had occurred. The Employer merely asked the Board, at this stage, to make a determination whether or not, in the course of its organizing campaign, the Union had breached sections 95(d) and 96 of the Canada Labour Code.

In light of the candid admission by Counsel, the Board concluded that the substantive complaint should be dismissed in that its determination had become moot. The parties

were so advised at the hearing and the Board reserved the right to provide these reasons for decision.

IV

Although the Employer only sought a declaration that the Union was in breach of the Code, and was not seeking any specific remedy, Counsel for the Employer invited the Board to hear the case and thereafter, if it saw fit, to fashion a remedy on its own that it deemed suitable in the circumstances.

Section 99 provides the remedial powers of the board; the relevant portions read as follows:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may:...

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

Although the entire section is not reproduced above, a review of the same will reveal that in addition to the general remedial powers conferred in paragraphs 99(1) and (2) as quoted, the section, in sub-paragraphs 99(1) (a) - (f), empowers the Board to grant

specific remedies for breaches of those provisions enumerated therein. No provision, however, is made for a specific remedy where sections 95(d) or 96 have been breached. Hence, the Board, if it were to accept Counsel's invitation, would be left to fashion a remedy within the broad general parameters of sections 99(1) and 99(2).

In Canadian Imperial Bank of Commerce (1985), 60 di 19; 10 CLRBR (NS) 182; and 85 CLLC 16,021 (CLRB no. 499), the Board made the following observation regarding the remedies it could formulate under the general provisions of section 99(1) and (2):

"The remedial powers contained in the section are broad, and necessarily so, for they are the manifestation of the desires of the will of the legislators to allow the Board, which is a specialized administrative tribunal, to fashion remedies that will meet the general intent of the Code. This will mean that the remedies so fashioned may at times be extensive. At other times, the Board may find that no remedy need be fashioned or that the remedy be minimum in scope. The determination of how extensive the remedy will be, can and will only be, determined by the Board taking into account all of the circumstances of the case before it and bringing to bear on the facts and conclusions, its specialized labour relations expertise."

Is there a limitation on the nature or type of remedy that may be fashioned by the Board pursuant to section 189 [now section 99]? In our view, there are two broad limitations. The first is that the remedy must not be punitive and its objectives must not be other than for sound labour relations; the second is that the remedy must not be designed to do other than to redress any imbalance that might have been created by any act or omission on the part of a party.

The remedy in each case then must be fashioned keeping in mind the need to reestablish the nature of the balance envisaged by the provisions of the Code, sound labour relations and the need not to punish but to remedy."

(pages 52-53; 215-216; and 14,153)

In the present circumstances, after having heard from Counsel for the parties, the Board was satisfied that there was no remedial order necessary which could, in the language of section 99(1), "...require the (Union) to comply with or cease

contravening..." sections 95(d) or 96 insofar as the conduct complained of had long since ceased. Equally, there was, in our view, no order required from the Board to compel the Union, in the words of section 99(2), "...to do or refrain from doing any thing...in order to remedy or counteract any consequence..." of its contravention of the Code if such was proven to have taken place. Simply put, there was no existing imbalance created by any "...act or omission on the part of a party", as referred to in Canadian Imperial Bank of Commerce (499), supra, that required a Board remedy to redress.

The purpose of relief granted by the Board in unfair labour practice cases is to, as far as possible, return the affected parties to the position they were in prior to the commission of the offense. In the present case, that situation was already extant. As well, an order from the Board should be designed to **correct** and **rectify** situations covered by the unfair labour practice alleged; - an objective that would not have been realized here.

To make a determination on whether or not a breach of sections 95(d) or 96 had occurred without being in a position to grant any practical remedy would not advance any sound labour relations purposes. Nor would anything be achieved by the Board hearing the merits of a case where its determination is only of historic or academic interest rather than remedial in its objectives.

We concluded therefore that even if the Board found that a breach of sections 95(d) or 96 had occurred, we would nevertheless, in the circumstances, not be inclined to "fashion" our own remedy as we were invited to do by Employer's Counsel. No remedy was necessary or sought and, from our point of view, no labour relations purpose would be served by the Board descending into the arena to fashion one in these circumstances.

V

Is the determination requested now moot; and, can the Board refuse, as it did, to hear it on that basis?

Section 98(1) of the Code provides as follows:

*"98.1 Subject to subsection (3), on receipt of a complaint made under section 97, the Board may assist the parties to the complaint to settle the complaint and shall, where it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, **hear and determine the complaint.**" ...*

(emphasis added)

The Board has consistently taken the view that section 98(1) requires it to hear, via a public hearing, complaints brought pursuant to section 97, - unless the complaint alleges a breach of sections 37 or 69 (section 98(2)), or the matter is deferred to arbitration (section 98(3)). However, the Board's obligation to "hear and determine" a complaint pursuant to section 98 cannot be interpreted to require the Board to hear the merits of complaints that are moot and for which a determination would have no practical effect on the parties' rights. The Board has repeatedly alluded, without elaboration, in past decisions to its power to dismiss complaints which are moot; see: Terminaux Portuaires du Québec Inc. (1991), 85 di 71 (CLRB no. 870); Halifax Grain Elevator Limited (1991) 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRB no. 867); and Purolator Courier Ltd. (1981), 45 di 300 (CLRB no. 344).

Recently, the Supreme Court of Canada comprehensively reviewed the notion of mootness. In Joseph Borowski v. The Attorney General of Canada [1989] 1 S.C.R. 342: the Court stated:

"The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or

abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. ..."

(page 353; emphasis added)

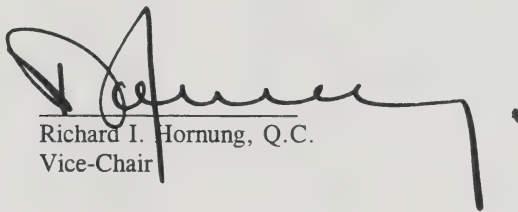
As indicated earlier, the certification application in the present case was withdrawn and the remedies originally sought by the Employer were no longer either requested or necessary. Furthermore, considering the terms of the Code and the Board's jurisprudence, neither was there any remedy that the Board considered appropriate in that any order that was available would have no practical effect on the rights of the parties. Accordingly, we concluded that subsequent to the initiation of the complaint, events had occurred - i.e. the withdrawal of the certification application - such that there was simply no present live controversy or concrete dispute still existing which affected the rights of the parties.

In the circumstances, on the basis of Borowski, supra, the issue was entirely moot.


There is no need to deal at length with the second step process outlined by the Supreme Court in Borowski, supra, relative to whether or not the Board, having determined that the issue is moot, should nevertheless exercise its discretion to hear

it. It suffices to say that none of the factors which the Court considered appropriate to induce a tribunal to exercise its discretion to hear a case that was otherwise moot, existed in the present circumstances.

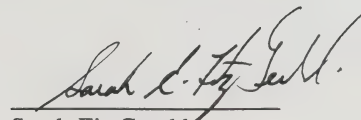
Accordingly, the employer's application was dismissed.



Richard I. Hornung, Q.C.
Vice-Chair



Calvin B. Davis
Member



Sarah FitzGerald
Member

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Summary

Canadian Broadcasting Corporation, *applicant*, Association des réalisateurs de la radio, National Association of Broadcast Employees and Technicians, Société des auteurs, chercheurs, documentalistes et compositeurs, Canadian Union of Public Employees, Acadia and Quebec Production Employees' Union, Syndicat des journalistes de Radio-Canada, Syndicat des techniciens du réseau français de Radio-Canada, Association des réalisateurs, *respondent unions*, CBC Managers' Association and Association of professionals and supervisors, *intervenors*.

Board File: 530-1828
CCRT/CLRB Decision no. 1091
November 15, 1994

Application filed under section 18 of the Canada Labour Code (Part I - Industrial Relations) seeking to review the bargaining units at CBC's French network.

The Board has already decided, further to a request filed by the respondent bargaining agents to reject the application, that the bargaining structure at the applicant's French network should be reviewed (decision no. 1023). This decision deals with the

Résumé

Société Radio-Canada, *requérante*, Association des réalisateurs de la radio, Syndicat national des travailleurs et travailleuses en communication, Société des auteurs, chercheurs, documentalistes et compositeurs, Syndicat canadien de la Fonction publique, Syndicat des employés de production du Québec et de l'Acadie, Syndicat des journalistes de Radio-Canada, Syndicat des techniciens du réseau français de Radio-Canada, Association des réalisateurs *syndicats intimés*, Association des cadres de Radio-Canada et Association des professionnels et superviseurs, *intervenantes*.

Dossier du Conseil: 530-1828
CCRT/CLRB Décision n° 1091
le 15 novembre 1994.

Demande fondée sur l'article 18 du Code canadien du travail (Partie I - Relations du travail) en vue de faire réviser les unités de négociation du réseau français de Radio-Canada.

Le Conseil a déjà, dans une décision rendue à la suite de la demande de rejet présentée par les agents négociateurs intimés, décidé que la structure de négociation du réseau français de la requérante devrait être révisée (décision n° 1023). La présente décision porte sur le



number of units that should be established and their intended scope. The Board found that four units were appropriate: the radio and television producers unit, the program production and presentation unit, the technical, trades and general labour unit and the general administrative unit.

nombre d'unités devant y être établi et portée intentionnelle. Le Conseil décide quatre unités sont appropriées: l' regroupant les réalisateurs de radio et télévision, une deuxième regroupant personnes affectées à la présentation et réalisation des émissions, une troisième regroupant le personnel technique, personnel de métiers et les manoeuvres et autre regroupant le personnel l'administration et de soutien administrati

This is an interim decision issued pursuant to section 20 of the Code. The Board is proceeding with its investigation of the configuration, with respect to classifications, of each unit.

Il s'agit d'une décision partielle en vertu l'article 20 du Code et le Conseil continue enquête quant à la composition, en termes classifications, de chacune des unités.

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LES MOTIFS DE DECISION DU CCRT SONT
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Reasons for decision

Canadian Broadcasting Corporation,

applicant,

and

Association des réalisateurs de la radio,
National Association of Broadcast Employees
and Technicians, Société des auteurs,
rechercheurs, documentalistes et compositeurs,
Canadian Union of Public Employees, Syndicat
des employés de production du Québec et de
l'Acadie, Syndicat des journalistes de Radio-
Canada, Syndicat des techniciens du réseau
français de Radio-Canada and Association des
réalisateurs,

respondent unions,

and

CBC Managers' Association and Association of
Professionals and Supervisors,

intervenors.

Board File: 530-1828

Decision no. 1091

November 15, 1994

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Ms. Ginette Gosselin and Mr. Robert Cadieux, Members.

Appearances

Ms. Suzanne Thibault, Q.C., and Mr. Guy Dufort, for the Canadian Broadcasting Corporation;

Mr. Gaston Nadeau, for the Canadian Union of Public Employees;

Mr. Clément Groleau, for the Syndicat des journalistes de Radio-Canada;

Mr. Allen Gottheil, for the Association des réalisateurs de la radio;

Mr. Jean-Pierre Belhumeur, for the Association des réalisateurs;

Mr. Gino Castiglio, for the Syndicat des techniciens du réseau français de Radio-Canada;

Mr. Pierre Grenier, for the Syndicat des employés de production du Québec et de l'Acadie;

Mr. Daniel Carrier, for the Société des auteurs, recherchistes, documentalistes et compositeurs;

Mr. James Duggan, for the Association of Professionals and Supervisors; and

Mr. Jean-Jacques Bérard, for the CBC Managers' Association.

I

INTRODUCTION

This decision deals with an application filed by the Canadian Broadcasting Corporation (CBC) under section 18 of the Code to review the bargaining units of its French network.

In its application, CBC, after stating its reasons, proposed the following units.

1. A program presentation unit
2. A program production unit
3. An administrative, office and support unit
4. A radio producers' unit
5. A television producers' unit

A similar application covering CBC's English network was the subject of an earlier Board decision (Canadian Broadcasting Corporation (1991), 84 di 1 (CLRB no. 846)). Furthermore, while the present application was pending before the Board, the Association of Professionals and Supervisors (APS) applied for certification to represent CBC employees who are members of professional corporations and who perform supervisory duties.

The unions initially objected to the application for review and asked that it be dismissed following CBC's presentation of its evidence. This motion by the unions was the subject of an earlier Board decision (Canadian Broadcasting Corporation (1993), 92 di 95 (CLRB no. 1023)) in which it held that a review was warranted. Respondent unions were invited to express their views and, if necessary, to submit evidence.

Subsequently, the respondent unions submitted their respective positions in writing on the redefinition of the bargaining units. What follows is a summary of these positions.

The Syndicat des journalistes de Radio-Canada (SJRC) expressed agreement with the presentation unit proposed by CBC, but took no position on the other units, other than to state that the producers should form a separate unit.

The Association des réalisateurs de la radio (ARR) proposed a single bargaining unit for all producers and took no position on the other units. Although opposed to the global review, the ARR recommended at the outset that the two producers' units be consolidated.

The Syndicat des techniciens du réseau français de Radio-Canada (STRF) agreed with the units proposed by CBC.

The Association des réalisateurs (AR) agreed to the first three units proposed by CBC, but stated its preference for a single producers' unit.

The Canadian Union of Public Employees (CUPE) proposed the following three units: a program production and presentation unit, a technical and trades unit, and an administrative and support unit. It took no position on the question of the producers.

The Syndicat des employés de production du Québec et de l'Acadie (SEPQA) proposed two units: a program production and presentation unit, and an administrative, secretarial and office unit.

The National Association of Broadcast Employees and Technicians (NABET - GCMI) supported SEPQA's proposal. It advised as well that it entered into negotiations with SEPQA concerning a possible transfer of its bargaining rights.

The Société des auteurs, recherchistes, documentalistes et compositeurs (SARDEC) opposed the Board's decision and reaffirmed its original position that the researchers form a separate unit. It also stated that it would not participate in the subsequent hearings on the determination of the bargaining units.

In the meantime, the Board received an application for certification from the APS. In brief, the APS seeks to represent supervisors and professionals who are employees within the meaning of the Code but are not currently unionized. Given the impact of this application on the review now in progress, APS was granted status of interested party in these proceedings.

When the hearing resumed, the Board heard union's evidence in support of their respective positions. CBC then presented rebuttal evidence.

During this second set of hearings, and as suggested by the Board, the parties discussed the possibility of a common proposal on the general configuration of the bargaining units.

At the parties' request, and in view of these discussions and developments related to APS's application for certification, which could subsequently impact on these proceedings, the summer hearing of 1994, was suspended. When the hearing resumed in September, the parties' positions had changed.

All bargaining agents, with the exception of SEPQA, agreed on the following units.

1. A production and presentation unit
2. A technical and trades unit
3. An administrative and administrative support unit
4. A radio and television producers' unit

The agreement specified the following:

"The intended scope of the above-mentioned units 1, 2 and 3 is essentially the same as that of the three bargaining units determined for the English network (file 530-1827), with the exception of the producers. Each of the undersigned parties reserve the right to identify during phase 2 which specific function or functions will be included in which units."

(translation)

CBC agreed with the unions on the number of units, but somewhat differed with them over the inclusion of certain classifications in units 1, 2 and 3. The Board decided that it would consider these differences at a later stage of the proceeding and that its immediate task should be limited to defining in general terms the intended scope of the units.

SEPQA maintained its position that two bargaining units were appropriate, one for all production and presentation personnel, and the other for administrative personnel. The producers, on the other hand, would belong to either unit 1 or APS's unit, depending on whether the Board decided they performed supervisory duties.

II

THE EVIDENCE

The evidence is considerable: 73 witnesses and more than 300 exhibits, including the viewing of 18 videocassettes. For the purposes of these proceedings, it need not be related in detail. Suffice it to say that this evidence gave us a complete picture of CBC's activities.

First, CBC presented its evidence, detailing its administrative structure and operation. Then, based on their positions, the unions presented their evidence. It focused primarily on the duties of the producers, the organization of work and the new production techniques. Members of existing bargaining units (producers, technicians, script or production assistants, crafts people) then explained and described their work. Former employees, who were major players during CBC's television producer strike of 1959, testified on the issues at stake in that lengthy dispute which led to the recognition of the right of association of the producers. Before their recognition, they were considered employer representatives and, as such, not allowed to unionize.

The Employer

CBC's mandate is to produce and broadcast radio and television programs. The Board had the following to say on the subject in Canadian Broadcasting Corporation (1023), supra, dealing with the unions' motion:

"Accordingly, it produces radio and television programs in English, French and some Aboriginal languages using national, regional and local production crews. The programs produced are described as information programs (news, public affairs and current events) and general programming. This diversity in language of production, broadcast medium and type of production, when combined with the administrative and support services required by an undertaking of this magnitude, results in a very complex organizational structure. But such complexity is not found in the labour relations department. Labour relations are managed from the head office in Ottawa; labour relations officers also work in Montréal and Toronto."

(pages 98-99)

Similarly, however complex the administrative structure, it does not affect the day-to-day work of the program production and presentation employees. In effect, the evidence revealed that, regardless of the type of production, broadcast medium and department to which these employees report, the organization of work remains the same as it is completely geared to program production.

Background

The Board will first refer to the evidence it considered in Canadian Broadcasting Corporation (1023), supra, which evidence is relevant to these proceedings.

"The unions began to establish themselves at CBC in the 1950s, along the lines of the structure and the production means existing at the time. Some of the original bargaining units were amended following decisions of the Board or its predecessor, and in many cases the bargaining agents have changed. We will give a concise description of the bargaining units covered by this application, indicating the approximate membership of each.

CUPE (1273 employees) consists of professional and office employees. For the purposes of these proceedings, it is worth noting that this unit includes the hosts, commentators-interviewers and announcers who work on all programs other than those produced by

the news service. This group was originally (1953) included in a national unit which was split between the two networks in 1980.

The SJRC (364 employees) was certified in 1968 under the name of Syndicat général de cinéma et la télévision. In addition to journalists, it also represents hosts, interviewers, commentators and researchers assigned to programs produced by the news service. This group too was originally (1952-1953) included in a national unit represented by the Canadian Wire Service Guild, Local 213 of the American Newspaper Guild.

SARDEC (51 employees) represents the researchers and documentalists hired by CBC for programs other than those of the Montréal news service. This unit results from a voluntary recognition by CBC. Its last collective agreement was in 1991.

SEPQA (672 employees) was certified in 1977 and 1978 to represent some of the French network production employees. This group includes machinists, painters, projectionists, editors, make-up artists, tailors/dressmakers and special-effects people. It also represented cameramen until the mid-1980s. This group was originally (1953) included in a national unit represented by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, which was replaced in 1968 by CUPE.

The STRF (696 employees) was certified in 1979 to represent employees in the French network technical group. This group includes technicians (maintenance, radio, television, control room, etc.), editors, cameramen, lighting specialists and sound-effects people. For the purposes of these reasons, it is important to note that the union also has jurisdiction over equipment belonging to CBC which the latter uses to produce its programs. From 1953 to 1979, this group was included in a national unit represented by NABET.

NABET-GCMI (57 employees) was certified in 1982. It represents employees in the building maintenance group in the province of Quebec and in Moncton. This group includes mechanics, carpenters, electricians and painters. It was originally (1963) included in the national unit also represented by NABET.

The AR (214 employees) was certified in 1981 to represent all categories of television producers in Montréal, Québec, Matane,

Rimouski, Sept-Îles and Moncton. The only effect of subsequent amendments to its certification has been to add some localities to the original list.

The ARR (109 persons) represents all categories of radio producers in the Quebec production centres of Montréal, Québec, Chicoutimi, Matane, Rimouski and Sept-Îles. This unit results from a voluntary recognition. Its last collective agreement was signed February 19, 1992.

Over the years, the Board has on numerous occasions amended these units. Apart from the above-mentioned changes, it has usually added classifications to or removed them from some bargaining certificate. However, one Board decision has been of greater importance: Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRB no. 383), where the Board found that free-lance hosts, commentators and interviewers were employees within the meaning of the Code, and directed that they join the existing certified groups, namely the SJRC or CUPE. Until then, these employees had been represented by the Union des Artistes (UDA). We will return to this later.

CBC's evidence also established the periodic occurrence of union jurisdictional disputes. While certain grievances remain pending, most have been settled, either by agreement between the parties or by the intervention of arbitration boards, and occasionally this Board. The evidence also demonstrated to us the intricacies of staffing involving various units of persons employed in the presentation of programs (journalists, hosts, interviewers, etc.). In these groups, union membership varies as much according to the place and origin of the programs as it does according to the actual job functions. To cite one example, a television weatherman on an early evening news program could be a member of the SJRC unit in Montréal and of the CUPE group in Québec.

CBC's evidence also demonstrated an evolution that has been both constant and radical in productions means and processes. One of the major changes in the 1980s was the replacement of film by videotape. This led to the disappearance of cameramen from the SEPQA group and their transfer, not an entirely smooth one, to the STRF. Computerization has also had a significant impact on the technical content of certain jobs.

The evolution of radio and telecommunications media resulted, especially in the 1980s, in a proliferation of broadcasters. We are thinking of the arrival of TQS, RDS, cable television with all of its channels, and so forth. These newcomers have directly affected CBC's capacity to market its programs. And when that revenue source dried up, CBC also had to reorganize certain services because of the budget restraints imposed by the federal government."

(pages 99-101)

The Producers

Producers are at the core of CBC's mandate. On request or on their own, they may design and present new program proposals to management or changes to programs they already produce. Of course these proposals deal with program content, but also with image, general format and production costs. Concurrently, or at a later stage, producers select those employees, either permanent or contract, they wish to work on their program. They are script or production assistants, actors, hosts, set decorators, computer-aided designers, hairdressers, make-up artists, technicians, editors, sound men, etc. Some crew members may not be taken on, but, as a rule, it appears that those hired have first been selected by the producer. If contract employees are used, the producers has the authority to select and hire them in accordance with the procedures established by CBC.

Once the project is approved, the producer is responsible for its successful completion within budget. A business manager is assigned to the program to help the producer meet its budget constraint.

Where more than one producer is required for the production of certain programs, CBC, after consulting the producers involved, may appoint one producer as executive producer whose duties include co-ordinating the producers' activities, their work plans and, on occasion, producing part of the program that he or she is co-ordinating. Each

producer, however, retains control over a program segment. Upon completing his or her co-ordinating duties, the executive producer returns to his or her regular duties as producer.

The producer's jurisdiction extends to the rehearsal and recording locations and the production schedule. If CBC facilities and equipment are not adequate, outside resources are used to carry out the project. The producer assumes here a decisive role.

Once the crew is assembled, the actual production begins. Through production meetings, which are held more or less regularly depending on the type of program, creative personnel is brought together to review the project and make any necessary changes.

For the most part, the persons assigned to the program work on it from start to finish. The production assistant plays a key role in this regard. Chosen at the very outset, he/she assist the producer with the co-ordinating functions. He/She calls and organizes meetings, communicates with operational services and ensures that the resources put at the producer's disposal are available on the premises. The job also involves secretarial duties and responsibility for correspondence, reports, etc. On request, the production assistant occasionally performs some of the producer's duties. Other duties may include attending rehearsals and studio recordings. The production assistant also works on live broadcasts such as news programs.

Other crew members, such as editors, do not become involved until the end of the production cycle, when the final product is prepared. Depending on the type of production, their respective roles can vary considerably. It stands to reason that the preparation and presentation of a newscast or live report during a general election do not require the same type of specialized skills as a prerecorded drama.

The role played varies depending on the nature of the duties: some crew members rely more on technical procedures involving the use of equipment, whereas others focus primarily on the creative aspects and content of the program. In some cases involving the making of television serials outside the studio or, for example, reports from abroad, an entire crew, or a good part thereof, may be required to travel for periods of varying lengths. It is the producer who then decides, based on production needs and budget, who goes. The production assistant is not always included.

The uncontradicted evidence on this point revealed that most aspects of both the "making" of a program and its presentation on radio or television come within the direct and decisive control of the producer in charge of the project. This control is multi-faceted, and is exercised in different ways, depending on the type of program and the size of the production crew. Producing a daily newscast, for example, requires close co-operation between the executive producer, a team of co-producers, the newsroom director or the news desk officer or, in the regions, the station manager. Some producers will be more closely related to the broadcast of a program.

The involvement of specialized technicians and seasoned crafts people can certainly lessen the extent of the producer's control. This, however, is not always the case. Production teams must often redo their work because it does not meet the producer's expectations. No evidence presented to the Board suggested any erosion of the type of veto power that seems to be the producer's over what goes into a production. Although the appointed business manager can veto certain proposals, it is the producer alone who seems to decide which proposals will ultimately be considered. A key part of the producer's control over a program thus relates to the direction and supervision of employees: the signing of time sheets, the authorization of overtime, and mainly the regular evaluation performance. These evaluations are crucial to an employee's career development, and will, if necessary, be used during the discipline process by managers who will rely on them.

Technological Change

It has been said that information technology has affected, and will continue to radically affect employment in the broadcasting industry. Computer technology has replaced electronics in processing image, sound and lighting. Editing is also done by computer. Images recorded on videocassette are transferred simultaneously with sound onto computer hard disk or diskette. Editing a program, in whole or in part, is done in the same way as word processing. Virtual cameras design three-dimensional objects. Dramas are acted and news is presented on sets or against backdrops that exist only as computer images. Sophisticated equipment makes it possible to manipulate and put in sequence two- and three-dimensional images, video sequences and sound, resulting in an uninterrupted and fully integrated sequence. In other words, equipment exists that combines film animation techniques and post-production work. Thanks to this equipment, a computer graphics designer can function as a kind of one-man production team because that person controls the image and the sound.

New camera technology has completely transformed a cameraman's job which used to emphasize strictly technical aspects. Today, cameras are much lighter, easier to operate, portable and focus automatically. They now require the operators to display more artistic creativity than technical know-how.

This advancement may produce another type of change. SEPQA told us of a New York television station that now ask of its reporters to produce their own reports including filming and recording the interviews themselves, then to do their own airing-ready editing in studio and to actually broadcast them. CBC's English network is at present involved in an experiment at its Windsor station following the reopening of its news service, which was closed due to budget cuts. Under an agreement with the unions concerned, various experiments are being conducted that involve multiskilling, an exercise made possible by the new technology. This project, described as strictly experimental, is to continue for two years. CBC, however, stated that it does not

regard the New York station's mode of operation as one it will consider. According to CBC, this approach, because it is based on technology not on content, will not produce information up to its quality standard. This experiment demonstrates at the very least the real breakdown of traditional barriers between trades that not so long ago were thought not to have anything in common.

III

ARGUMENTS

SEPQA was the only party to take exception to the unanimous arguments of the other parties.

All parties, with the exception of SEPQA, insisted that the consensus they achieved at the Board's strong urging on the questions of the number of units and of the producers' unit can hardly be disregarded.

SEPQA proposed the creation of two bargaining units: a unit consisting of the administrative support personnel, and the other comprised of all remaining program production personnel. The other parties proposed four units: a producers' unit, a production employees and on-air personnel unit, a technical unit and an administrative support unit.

With regard to the producers, all parties, save SEPQA, agreed that they constitute supervisory personnel. They were therefore asking the Board to uphold this distinction by establishing a separate unit for them. They argued that because there is ample evidence that the duties of the producers entail the supervision of other employees, the Board should not depart from its normal practice, of not including supervisors in the same units as the employees they supervise where their numbers justify it. They separated these proceedings from those involving the English network in which the

Board decided otherwise. They emphasized the difference in duties between the two networks and pointed out that, although the employer is the same, the Board must base its decision on the facts specific to each case. They stressed as well the historical importance and continuing significance of the circumstances that resulted in recognition of the producers' right of association.

SEPQA, on the other hand, considered that the producers do not really perform supervisory duties based on the methods of allocating material resources and assigning employees to various production crews. It pointed to CBC's organizational structure, where all its departments have an abundance of management personnel. According to SEPQA, that is where lies real decision-making authority relating to all aspects of the supervision of production employees. The producers' role in supervising other employees involves only the professional, or creative, aspects of their duties, and does not warrant the creation of a producers' unit. In conclusion, however, SEPQA added that were the Board to conclude otherwise, the appropriate unit would be the one for which APS is seeking certification.

However, there is unanimity on the administrative unit. All parties agreed that the administrative personnel constitute a separate group based on the established criteria for determining bargaining units.

The remainder of the debate dealt with the number of units that should be established for the so-called production employees and the on-air personnel, including journalists.

The bargaining agents, with the exception of SEPQA, and the employer argued that there should be two units: a technical and trades unit and a unit consisting of the personnel involved in preparing and presenting programs.

Their proposal is based on the following arguments. Each of these two groups is homogeneous and relates to a different facet of production. One consists of persons

involved with the content and presentation of programs; this work is more cerebral than manual; the other consists of technical or trades employees involved with the structure or form of programs, or who perform manual work. These divisions reflect a recognized model of units appropriate for bargaining. They offer solutions to the problems identified by the Board in its previous decision (Canadian Broadcasting Corporation (1023), supra), problems which persuaded the Board to review the existing bargaining units. As well, this is the model the Board adopted in its decision involving the English network. The bargaining agents argued that, contrary to SEPQA's request, the Board does not have to find a solution that goes beyond resolving existing problems, or to seek solutions to potential problems. While they admitted that SEPQA's proposal may be an ideal model, they were unanimous in asking the Board to proceed with care. The Board does not have to create the most appropriate units for collective bargaining, but merely units appropriate for bargaining. In the instant case, given the size of the employer, and the large number and wide diversity of classifications within the organization, four bargaining units within CBC's French network constitute an entirely appropriate bargaining structure.

SEPQA replied that its proposal for a single bargaining unit for all program production personnel meets all the criteria of a global review: it eliminates jurisdictional disputes between unions, keeps the number of units to a minimum, ensures industrial peace and avoids creating units along trade or classification lines. It also mirrors the existing work organization model at CBC. In SEPQA's opinion, the production of programs, whether information, variety or sports programs, is constant. There is a production crew, and the knowledge and skill of each member are put to use simultaneously, or in turn, in order to ultimately produce a program. SEPQA concluded that the other parties' proposal clings to the past, whereas its proposal looks to the future.

IV

ANALYSIS AND DECISION

This review application is based on section 18 of the Code which reads as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

The question of whether the CBC's application should be heard on its merits has already been decided (Canadian Broadcasting Corporation (1023), *supra*). The purpose of this decision is therefore to determine the broad lines and general profile of a bargaining structure for the French network.

The parties are well aware of the criteria used to determine units appropriate for collective bargaining. They began discussing the configuration of the units at the Board's invitation in the hope that an agreement could be reached. The Board need not provide them with a lengthy explanation of these criteria. It merely notes the summary of these criteria which it provided in Canadian Broadcasting Corporation (846), *supra*, and which still applies:

"1. Bargaining units must be defined in general terms (Tele globe Canada (1979) 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198)).

2. There should be, as a matter of basic principle, one unit for all employees. Units should not be fragmented or their numbers increased except for compelling reasons (Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675)).

3. Supervisory personnel should not be in the same unit as the employees they supervise. (For a recent review of the Board's

jurisprudence on the issue, see Island Telephone Company Limited (1990), 81 di 126 (CLRB no. 811).)"

(page 15)

The Board heard detailed evidence concerning both the conduct and the history of bargaining at CBC. There was, as well, an agreement between the employer and all unions concerned, save one, as to what the configuration of the units should be.

Although not bound by this agreement, the Board considers nevertheless that, unless there is serious reason to do so, the agreement should not be disregarded for it reflects the guiding principles of a global review.

An analysis of the evidence persuaded the Board that the four units proposed by the CBC, CUPE, the STRF, the SJRC, the AR and the ARR meet these criteria, and constitute an appropriate bargaining structure for CBC's French network. The central question raised by this structure is where the producers belong.

In the Board's opinion, the evidence demonstrates that the producers perform supervisory duties vis-à-vis other employees, and play a decisive role in their careers. These duties go beyond mere professional supervision. They involve the performance evaluation, and the career paths of other employees. There is clearly a potential for conflicts of interests if the producers are included in the same unit as the other employees.

It would not be appropriate to include the producers in the unit sought by APS. These two groups perform distinct supervisory duties. The absence of a community of interest between them, and the history of bargaining by the producers in CBC's French network, warrant the creation of separate units. The Board has already indicated that APS's unit would be a national one, which could not be the case with

the producers, regardless of their network. We must also bear in mind that APS's unit does not yet exist and has yet to establish its representative character.

Moreover, there is no justification in terms of the production function for perpetuating a labour distinction that exists nowhere else between radio and television.

The Board will therefore establish a unit for all radio and television producers who work for CBC's French network. The Board is mindful of the fact that this structure does not mirror that of the English network. This will come as no surprise as it was established at the outset that the two networks are not only separate but also different. The record shows that, at the English network, all parties have always insisted that the producers performed no supervisory function. At the French network, the parties, led by the employer, alleged and proved the exact opposite. It is this evidence that made a difference.

Relying further on the evidence, the Board decides that it is appropriate to establish two other bargaining units: one consisting of program production and presentation personnel, excluding the producers, and the other of technical and trades employees and labourers, excluding the supervisors.

Although SEPQA's proposal to consolidate them in one unit may be viewed as the ideal model, the evidence does not support such a move. At the present time, the broadcasting industry in general, and CBC in particular, are experiencing enough turmoil without the Board further exacerbating it and going against the wishes of the majority. The Board's role, as it has consistently held in past decisions, is to define the units it deems appropriate for bargaining. The two units just identified by the Board meet such a requirement.

Finally, it is also appropriate to establish a separate unit that will consist of all administrative and administrative support personnel. All parties agree that such a unit is appropriate for bargaining. There is no reason here to disregard this unanimity.

In the light of the foregoing, the Board decides that the following units are appropriate for bargaining.

Unit no. 1 - Program production and presentation personnel, excluding producers and supervisors and including:

All on-air personnel, and all persons employed mainly in program design, preparation, production, co-ordination and finalization, excluding producers and employees whose main duties consist in supervising other employees.

Unit no. 2 - Technical personnel, trades personnel and labourers, excluding supervisors and including:

All personnel who perform mainly technical, maintenance and manual work, or blue-collar employees, excluding persons whose main duties consist in supervising other employees.

Unit no. 3 - All administrative and administrative support personnel, excluding supervisors and including:

All personnel who perform mainly office or secretarial or administrative duties in such services as finance, personnel and sales, or white-collar workers, excluding persons whose main duties consist in supervising other employees.

Unit no. 4 - Producers

All persons employed as radio and television producers.

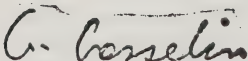
With regard to the profile of the unit of administrative personnel and the scope of the exclusion of the so-called "supervisory" personnel from the above-described units, a clarification is in order. This exclusion and the profile of the administrative unit have been described, for the time being, in general terms and serve as a guide. The specific definition and scope are related to the definition of APS's unit which, as this decision is being issued, has yet to be defined. The necessary changes will be made once APS's unit has been described.

The Board will now define the specific content of the above-described units. To the extent that the agreement reached by the parties and approved by the Board stated that it adopted the broad lines of the units described at the English network, this should simplify the Board's task.

This is an interim decision issued under section 20(1) of the Code. The Board is continuing its investigation of the composition of the units in terms of the classifications to be included in each. The parties will receive instructions shortly in this regard.



Serge Brault
Vice-Chairman



Ginette Gosselin
Member



Robert Cadieux
Member

information

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Summary

Canadian National Railway Company, applicant, and National Automobile, Aerospace, Transportation and General Workers Union of Canada, respondent.

Board File: 725-359
CLRB/CCRT Decision no. 1092
November 24, 1994

This application related to shopcraft employees at the employer's facilities across Canada. The employer applied pursuant to section 91(1) of the Code alleging that the respondents declared or authorized a strike contrary to s. 89 of Code.

For many years, these employees were represented by one or another of six craft unions. By the spring of 1994, of the six bargaining units, represented by six bargaining agents, five were entitled to authorize a strike, and the employees in those five units would have been entitled to participate in a strike. The employer was entitled to lock out employees in any or all of those five units, and it was entitled to alter the terms and conditions of such employees. It had in fact done so, including the removal of access to the arbitration of grievances. With respect to the sixth bargaining unit, the Carmen, the statutory freeze was in effect, and the terms and conditions of employees in that unit were those which had been contained in the expired collective agreement.

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Résumé

La compagnie des chemins de fer nationaux du Canada, requérante, Le syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada, intimés.

Dossier du Conseil: 725-359
CLRB/CCRT Décision n° 1092
le 24 novembre 1994

La présente affaire vise les employés de métier d'atelier qui travaillent dans les locaux de la Compagnie des chemins de fer nationaux du Canada partout au Canada. L'employeur a présenté la demande aux termes du paragraphe 91(1) du Code. Il alléguait que le syndicat intimé avait déclaré ou autorisé une grève qui était illégale, aux termes de l'article 89 du Code.

Pendant bon nombre d'années, ces employés ont été représentés par l'un ou l'autre de six différents syndicats de métier. Au printemps de 1994, parmi les six unités de négociation, représentées par six agents négociateurs, cinq avaient acquis le droit de grève et les employés faisant partie de ces unités auraient eu le droit de participer à la grève. L'employeur, pour sa part, avait le droit de déclarer un lock-out qui toucherait les employés de l'une de ces cinq unités, ou ceux de toutes les unités, et il était autorisé à modifier leurs conditions d'emploi. C'est ce qu'il a fait, entre autres en supprimant le recours à l'arbitrage. La sixième unité de négociation, celle des wagonniers, était assujettie au gel légal des conditions d'emploi, et les conditions de ces employés étaient celles qui étaient prévues dans la convention collective expirée.

In June 1994, following hearings and a representation vote, the Board, pursuant to section 18 of the Code, issued a certificate to the CAW in respect of a new "industrial" bargaining unit for all shopcraft employees.

The CAW sent the employer a notice to bargain pursuant to section 49(1) of the Code. While, in the majority's view, such notice would have more appropriately been given pursuant to section 48 of the Code, notice to bargain was given. That gave rise to a duty to bargain and, again, to a "freeze" of the terms and conditions of employment, pursuant to section 50 of the Code.

The freeze thus imposed was in effect until the requirements of section 89(1), paragraphs (a) to (d) were met. Those requirements had not been met. As a result, employees of the new unit going on strike would have been in breach of s. 89(2) and a union calling a strike would have breached s. 89(1).

The argument that some members of the bargaining unit were entitled to strike because some classes of employees in the present unit had been entitled to strike in the past was dismissed. The bargaining units in the context of which they had a right to strike no longer existed. The majority held that the purposes of the Code would be frustrated, rather than advanced, by permitting the strange "carry-forward" into negotiations in respect of a new bargaining unit of a right to strike which had been "acquired" in previous negotiations in respect of different units.

En juin 1994, à la suite d'audiences et de tenue d'un scrutin de représentation, le Conseil, aux termes de l'article 18 du Code, a accrédité le TCA à titre d'agent négociateur d'une unité de négociation «industrielle» regroupant tous les employés d'atelier.

Le TCA a signifié à l'employeur un avis négocier conformément au paragraphe 49(1) du Code. Bien que la majorité estime qu'il eût été plus exact de signifier cet avis aux termes de l'article 48 du Code, il demeure que l'avis de négocier a été signifié. Il en est résulté un devoir de négocier et, encore une fois, un gel des conditions d'emploi, aux termes de l'article 50 du Code.

Le gel ainsi imposé devait demeurer en vigueur jusqu'à ce que les exigences de l'alinéa 89(1)a) à d) soient remplies. Ces exigences n'ont pas été remplies. Par conséquent, si les employés de la nouvelle unité avaient fait la grève, cela aurait entraîné une violation du paragraphe 89(2) du Code. Par ailleurs, si le syndicat avait déclaré la grève, cela aurait entraîné une violation du paragraphe 89(1) du Code.

L'argument selon lequel certains membres de l'unité de négociation avaient le droit de faire la grève du fait que certaines catégories d'employés dans l'unité actuelle avaient, par le passé, acquis ce droit, est rejeté. Les unités de négociation, dans ce contexte du droit de faire la grève, n'existent plus. La majorité est d'avis que d'autoriser cet étrange «transfert» d'un droit de grève «acquis» lors de négociations antérieures à l'égard de différentes unités de négociation aux négociations touchant une nouvelle unité ne favoriserait pas, et même frustrerait, la réalisation des objectifs du Code.

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The further argument that, as a matter of labour relations principle, employees must have the right to strike if they do not have the right to arbitration, one being a *quid pro quo* for the loss of the right to the other, was also dismissed in this situation. The Board held that these employees were in no more an "anomalous" position than employees in a unit for which a first collective agreement has yet to be negotiated.

The application was allowed. The Board declared the strike authorized by the union to be unlawful.

Summary of dissent

The application presented by CN, alleging that the apprehended strike is unlawful, raises the issue of the impact of bargaining unit consolidation on the collective bargaining regimes in place at the time the consolidation takes effect.

In the present case, prior to an order issued by the Board on June 29, 1994, consolidating six bargaining units at CN into one and certifying the CAW as the bargaining agent for the unit, the employees of five of the units had acquired the right to strike. CN then unilaterally modified the terms and conditions of employment, removing the right to arbitration.

CN views the June 1994 order as a fresh certification with no carry-over of acquired rights. According to CN, following the consolidation, the right to strike previously acquired is lost and since the requirements of section 89 of the Code have not been met for the new unit, the right to strike does not exist.

L'autre argument selon lequel les principes en matière de relations du travail exigent que les employés aient le droit de grève s'ils n'ont pas le droit de recourir à l'arbitrage, l'une étant la *quid pro quo* de la perte du droit à l'autre, est également rejeté dans ces circonstances. La majorité déclare que la situation dans laquelle se trouvent ces employés n'est pas plus «anormale» que celle dans laquelle se trouvent des employés d'une unité pour laquelle on a pas encore négocié une première convention collective.

La demande est accordée. Le Conseil déclare que la grève autorisée par le syndicat est illégale.

Résumé de l'opinion dissidente

La demande présentée par CN, alléguant que la grève prévue est illégale, soulève la question de l'effet d'une consolidation des unités de négociation sur les régimes de négociation collective qui étaient en place au moment où cette consolidation a pris effet.

Dans la présente affaire, avant l'ordonnance rendue le 29 juin 1994 aux termes de laquelle le Conseil regroupait six unités de négociation de CN en une seule unité et accréditait le TCA à titre d'agent négociateur de cette unité, les employés de cinq unités avaient obtenu le droit de grève. Par la suite, CN a modifié unilatéralement les conditions d'emploi en supprimant le droit à l'arbitrage.

CN considère l'ordonnance de juin 1994 comme une nouvelle accréditation, sans transfert des droits acquis. Selon CN, en raison de la consolidation, le droit de grève qui avait été acquis auparavant est perdu, et puisque les conditions prévues à l'article 89 du Code n'ont pas été remplies à l'égard de la nouvelle unité, le droit de grève n'existe pas.

The employees concerned are nevertheless governed by the terms and conditions of employment, without recourse to arbitration, that were unilaterally imposed by CN prior to the consolidation order.

This, however, is not a case of an initial certification with no previous bargaining history. CAW, as a result of its certification, is substituted as the bargaining agent in the existing bargaining regime and assumes all the rights and privileges held by its predecessors at the time of its substitution. The right to strike, having already been acquired, necessarily survives the consolidation order in the same manner as the employer's right to impose its unilateral conditions of employment survives the consolidation order.

To conclude otherwise results in the eradication of acquired rights and alters the balance of power with respect to the parties involved in a collective bargaining regime. As such, it is contrary to the intent and spirit of the Code.

Consequently, Vice-Chair Handman concludes that the apprehended strike is lawful and would dismiss the application.

Les employés visés sont toutefois assujettis aux conditions d'emploi, sans recours à l'arbitrage, qui ont été imposées par CN avant l'ordonnance de consolidation.

Cependant, il ne s'agit pas d'une nouvelle accréditation sans antécédents de négociation. Le TCA, par suite de son accréditation, a remplacé les anciens agents négociateurs dans le cadre du régime de négociation collective. Il assume tous les droits et privilèges que détenaient ses prédécesseurs lorsque s'est opérée la substitution. Le droit de grève, ayant été acquis, survit nécessairement à l'ordonnance de consolidation, tout comme le droit de l'employeur d'imposer unilatéralement des conditions d'emploi.

Conclure autrement équivaudrait à révoquer des droits acquis et modifierait l'équilibre des forces entre les parties dans un régime de négociation collective. Tel résultat irait à l'encontre de l'intention et de l'esprit du Code.

Par conséquent, la vice-présidente Handman conclut que la grève prévue serait légale et elle rejetterait la demande.

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Reasons for decision

Canadian National Railway Company
Montréal, Quebec

applicant,

and

National Automobile, Aerospace,
Transportation and General Workers Union of
Canada (CAW-Canada)

respondent
certified
bargaining agent.

Board File: 725-359
CLRB/CCRT Decision no. 1092
November 22, 1994

The Board was composed of Mr. J.F.W. Weatherill, Chairman; Ms. Suzanne Handman, Vice-Chair; and Mr. Michael Eays, Member. A hearing was held on November 19 and 20, 1994, at Montréal.

Appearances

Mr. John Coleman & Ms. Mary Gleason, for the applicant; and
Messrs. Steve Waller & Abe Rosner, for the respondent.

These reasons for decision for the majority were written by Mr. J.F.W. Weatherill, Chairman.

I

This is an application by Canadian National Railway Company alleging that the respondents, CAW and Tom Wood, have declared or authorized a strike whose effect would be to involve the participation of employees in a strike contrary to

Part I of the Canada Labour Code. An application of this sort may be brought pursuant to section 91(1) of the Code.

A strike by employees of the Company in the bargaining unit involved would, it is alleged, be in contravention of section 89 of the Code, which section prohibits a strike or lockout unless certain requirements are met, and those requirements are said not to be met in this case.

II

That the union, or at least Rail Division Local 100 thereof, has authorized a strike, to begin on November 22, 1994, is clear from a letter sent to the Company by Mr. Wood, President of Local 100, on October 31, 1994, in which it is stated that, unless settlement of a certain grievance (the nature of which is irrelevant to these proceedings) is reached on or prior to November 21, 1994, "the Union will commence legal strike action beginning on or after November 21, 1994".

The facts relevant to this application are not in dispute, and are as follows. The application relates to shopcraft employees at the Company's facilities across Canada. For many years, these employees were represented for the purposes of collective bargaining by one or another of six craft unions. Each of these unions has, in the past, entered into collective agreements with the Company in respect of the bargaining unit for which it was bargaining agent. On December 31, 1991, the six collective agreements then covering all of the classes of employees affected by the present application (that is, all the shopcraft employees), expired. Negotiations for the renewal of these agreements were held, but in only one case, that of the bargaining unit consisting of Carmen, was a renewal agreement reached. No agreements were reached in respect of the other five shopcraft bargaining units, and when the procedures contemplated by the Code had been exhausted (that is, when the requirements of section 89 had been met), those unions were in a position

to strike, and the Company was in a position to lock out, or to alter the terms and conditions of employment of the employees in those units. There appears to have been no strike or lockout but the Company did, as it is acknowledged it was entitled to do, unilaterally impose new terms and conditions of employment. One aspect of the changed terms and conditions was that there was no longer a general right of arbitration of grievances relating to those terms and conditions. In the case of the Carmen's bargaining unit, a renewal agreement was reached. That agreement in turn expired on December 31, 1993. Again, bargaining with a view to a renewal agreement occurred, although the procedures contemplated by the Code were not exhausted and no right to strike, lockout or alter terms and conditions of employment arose.

When notice to bargain for a renewal of the agreement which expired on December 31, 1993 (the Carmen's agreement) was given, terms and conditions of employment were then "frozen" by virtue of section 50 of the Canada Labour Code. Section 50 provides as follows:

"50. Where notice to bargain collectively has been given under this Part,

(a) [there is a duty to bargain]

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition or such a right or privilege."

Thus, in the spring of 1994, the situation in the CN shops was that there were six bargaining units, represented by six bargaining agents. Five of those bargaining agents were entitled to authorize a strike, and the employees in those five units

would be entitled to participate in a strike. The employer was entitled to lock out employees in any or all of those five units, and it was entitled to alter the terms and conditions of such employees. It had in fact done so, and it was entitled to do so again. With respect to the sixth bargaining unit, the Carmen, the statutory freeze was in effect, and the terms and conditions of employees in that unit were, in fact, those which had been contained in the expired collective agreement.

On June 29, 1994, following a series of lengthy hearings and the conduct of a representation vote, this Board, which had decided in an application brought pursuant to section 18 of the Code that shopcraft employees should all be included in a single bargaining unit, issued a certificate to the CAW (which had been successful in the vote) in respect of the new bargaining unit. The CAW had previously been the bargaining agent for the Carmen's bargaining unit. By virtue of the certificate issued on June 29, 1994, it became bargaining agent for the new "industrial" unit which had been found to be appropriate. At the same time, the Board revoked the certificates which had been issued to other trade unions in respect of the other, now vanished, bargaining units. Nothing turns on the fact that the Board "replaced" rather than "revoked" the certificate issued to the CAW: the Carmen's unit vanished just as much as did all the other craft units, and the CAW holds its new certificate, no longer as bargaining agent for a unit of Carmen (which unit was not "revised" or "expanded"), but as bargaining agent for the new "industrial" unit of shop employees.

On July 7, 1994, as it was then entitled to do, the CAW sent the employer a notice to bargain. This notice purported to be made pursuant to section 49(1) of the Code. Section 49(1) provides that

"49.(1) Either party to a collective agreement may, within the period of three months immediately preceding the date of expiration of the term of the collective agreement, or within such longer period as may be provided for in the collective agreement,

by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement."

The notice advised that what was sought was the renewal of collective agreement 12.35, which had been the collective agreement in respect of the Carmen's bargaining unit. There is no evidence before us as to the period in which such notice could have been given under that agreement, but it will be recalled that negotiations in respect of that unit had already taken place during the period when the CAW was bargaining agent for the Carmen's bargaining unit. The notice to bargain of July 7 refers, quite properly, to bargaining in respect of the new industrial bargaining unit - the unit, and the only unit of shopcraft employees at CN for which the CAW was now bargaining agent. In our view, it would have been more appropriate for the notice to have been given pursuant to section 48 of the Code, which is as follows:

"48. Where the Board has certified a bargaining agent for a bargaining unit and no collective agreement binding on the employees in the bargaining unit is in force [both those conditions obtained in this case], the bargaining agent may, by notice, require the employer of those employees, or the employer may, by notice, require the bargaining agent to commence collective bargaining for the purpose of entering into a collective agreement."

However that may be, it is clear that a notice to bargain was given. That gave rise to a duty to bargain and, again, to a "freeze" of the terms and conditions of employment, pursuant to section 50 of the Code. Section 50, the material provisions of which have been set out above, applies "Where notice to bargain collectively has been given under this Part", and applies equally in respect of notices given under section 48 or section 49(1).

The freeze thus imposed is in effect until the requirements of section 89(1), paragraphs (a) to (d) are met. Section 89(1) is as follows:

"89. (1) No employer shall declare or cause a lockout and no trade union shall declare or authorize a strike unless

(a) the employer or trade union has given notice to bargain collectively under this Part;

(b) the employer and the trade union

(i) have failed to bargain collectively within the period specified in paragraph 50(a), or

(ii) have bargained collectively in accordance with section 50 but have failed to enter into or revise a collective agreement;

(c) the Minister has

(i) received a notice, given under section 71 by either party to the dispute, informing him of the failure of the parties to enter into or revise a collective agreement, or

(ii) taken action under subsection 72(2); and

(d) seven days have elapsed after the date on which the Minister

(i) notified the parties of his intention not to appoint a conciliation officer or conciliation commissioner or to establish a conciliation board under subsection 72(1),

(ii) notified the parties of his intention not to appoint a conciliation commissioner or to establish a conciliation board under section 74, or

(iii) released a copy of the report of a conciliation commissioner or conciliation board to the parties to the dispute pursuant to paragraph 78(a)."

These requirements have not been met. A notice of dispute, clearly relating to the desire to negotiate a collective agreement in respect of the new industrial

bargaining unit, was sent to the Minister of Labour. A conciliation officer was appointed. The officer has not yet reported, and the Minister has not yet taken any of the actions contemplated by section 89(1)(d).

Not only is the "freeze" in effect, but by section 89(2) of the Code,

"89. (2) No employee shall participate in a strike unless

(a) the employee is a member of a bargaining unit in respect of which a notice to bargain collectively has been given under this Part; and

(b) the requirements of subsection (1) have been met in respect of the bargaining unit of which the employee is a member. "

We emphasize that the notice and the bargaining must be "in respect of the bargaining unit of which the employee is a member". As the result of the issuance of the Board's certificate on June 29, 1994, shopcraft employees are members of one bargaining unit, and as a result of the revocation and revision of former certificates, they are members of no other bargaining unit at CN. It is the new, industrial unit in respect of which notice to bargain was given. With respect to that unit, the requirements of section 89(1) have not been met. It necessarily follows that no employees in the new industrial unit may go on strike at the present time (that would be in contravention of section 89(2)) and that no trade union may call or authorize a strike with respect to this unit at this time (that would be in contravention of section 89(1)).

It is argued, however, that some members of the bargaining unit are entitled to strike. The basis for this argument is that some classes of employees in the present unit - those who had been members of one or another of the five non-Carmen craft unions - had, as we have noted, been entitled to strike in the past. They had, of course, been free to strike then, because the requirements of section

89 had been met in respect of the bargaining units of which they were then members. Those bargaining units no longer exist, however, and the provisions of section 89 now apply, quite clearly, to the bargaining unit of which they are now members. The question is not what rights employees - or trade unions, or employers - may once have had under a now-vanished collective bargaining "régime". The question is one of current bargaining for a collective agreement in respect of the present bargaining unit of which, and only of which, the employees in question are now members.

It is further argued that as a matter of labour relations principle, a "purposive" interpretation should be given to section 89 of the Code. We agree with that as a matter of principle, and indeed we believe we have given such a reading to the provision, although its terms are clear in any event, in our view. In this regard, however, the apparently anomalous effects of the various applications of the "freeze" provisions of the Code during the periods of time to which we have referred are said to militate in favour of an interpretation of the Code which would entitle some members of the same bargaining unit to strike while others may not. It will be recalled that the non-Carmen craft unions, whose collective agreements expired in 1991, did not succeed in negotiating new collective agreements. The requirements of section 89 being met, they were in a strike position. There was no strike or lockout, but the terms and conditions of employment were changed, as we have seen. Then, when the new bargaining unit was established and a new certificate issued to what was, for these employees, a new bargaining agent, a notice to bargain was issued. That notice meant that terms and conditions of employment were, by the effect of section 50, frozen. For the non-Carmen employees, the terms and conditions that were frozen were those which had been imposed by the employer, and did not include a general right to arbitration. The employees, once that notice was given, could not go on strike, nor could the employer, it may be noted, lock out employees or alter the terms and conditions of employment.

For employees in the Carmen's craft, however, their terms and conditions of employment, also frozen by virtue of the July 7 notice and the effect of section 50, happen to have been those which were already subject to a freeze, prior to the change in "régime" created by the establishment of the new industrial unit. These terms and conditions were essentially those of the collective agreement which had expired on December 31, 1993.

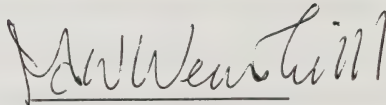
Whether this situation be considered anomalous or not - and it would be no more so than that created by other wage freezes where employers had established different terms and conditions of employment for different classes of employees, or even different individuals - much was sought to be made of the fact that the non-Carmen employees have no general entitlement to arbitration. It was asserted that employees must have the right to arbitration if they do not have the right to strike, and that one is a quid pro quo for the loss of the right to the other. There are of course, many instances where employees are without a right to arbitration and at the same time not entitled to strike - the case of employees in a unit for which a first collective agreement has yet to be negotiated is an example. Further, the authorities quoted in support of this argument do not in fact support the argument. Thus, in his book "Reconcilable Differences", Professor Weiler states, at p. 91:

"If we are to achieve even a modicum of industrial stability while collective agreements are in place, we must provide workers with a satisfactory source of relief for such grievances against their employer which might otherwise spark work stoppages. This is exactly what Canadian legislation does. As the quid pro quo for the prohibition on strike action during the term of a collective agreement, our statutes typically mandate a system of binding arbitration as the mechanism for settling contract grievances without any stoppages of work."

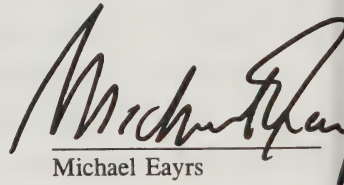
Professor Weiler certainly does not state that employees have a right to arbitrate wherever they do not have the right to strike. The right to arbitrate is an attribute

of a collective agreement and it is in the context of a collective agreement, as Professor Weiler clearly states, that it is a quid pro quo for the right to strike. If it were otherwise, organizational strikes would be legal. It is quite clear from the Code, of course, that they are not. We have no doubt that the purposes of the Code would be frustrated, rather than advanced, by permitting the strange "carry-forward" into negotiations in respect of a new bargaining unit of a right to strike which had been "acquired" in previous negotiations in respect of different units, which is argued for here.

For all of the foregoing reasons, the application is allowed. The Board declares the strike authorized by the union to be unlawful, and will issue an Order accordingly.



J.F. W. Weatherill
Chairman



Michael Eayrs
Member

DISSENT

Reasons for the dissent of Ms. Suzanne Handman, Vice-Chair.

I have read the decision of my colleagues and, with respect, I must dissent.

I

The issue in the present case is whether, following the Board's consolidation order¹ dated June 24, 1994, the apprehended strike authorized by the respondents is lawful or not. It is therefore important to consider the situation as it existed at that date.

It is not necessary to reiterate all the facts contained in the majority decision. Suffice it to say that at the time of the consolidation order, the employees of the "carmen bargaining unit" were governed by the terms and conditions of their expired collective agreement which included the right to arbitration while the employees of the other five shopcraft units were governed by the terms and conditions decreed by the employer in June, 1993, without recourse to arbitration. They did, however, have the right to strike.

In this context, when presented with a grievance regarding an employee dismissed in June 1994, CN refused to proceed to arbitration on the grounds that the prevailing terms and conditions of employment governing this employee did not include the right to arbitration. CAW responded that, in the absence of arbitration, it intended to exercise its legal right to strike. CN then filed the present application alleging that the apprehended work stoppage constitutes an unlawful strike under the terms of the Canada Labour Code.

1

The term "consolidation order" refers to the order issued by the Board on June 29, 1994, which certified the CAW as the bargaining agent for a consolidated unit and which gave effect to a previous decision to consolidate six bargaining units at CN into one unit.

II

The position advanced by CN, as set out in the majority decision, is that the Board's consolidation order resulted in a new certification without any carry-over of acquired rights. As a result, the notice to bargain sent by CAW to CN on July 7, 1994 froze the terms and conditions as they stood at that date. For the employees of the carmen unit, this means that their working conditions are determined by the terms of their expired collective agreement while the employees of the five shopcraft units are governed by the terms and conditions imposed by the employer. As for the right to strike already acquired by the shopcraft employees, according to CN, whatever right had existed prior to the consolidation order no longer exists since the five shopcraft units have ceased to exist. Consequently, the clock begins ticking anew and the right to strike will only be acquired when all the procedural steps, following the July 1994 notice to bargain, have been met for the entire unit.

CN is treating the situation following the consolidation order as if it were an initial certification with no previous collective bargaining relationship between the parties. However, this is clearly not the case.

III

There are no specific provisions in the Code governing the impact of bargaining unit consolidation on the collective bargaining regime(s) in place at the time of consolidation. We may nevertheless find guidance in determining the consequences of a consolidation order by looking at the purpose of the Code which is designed to encourage free collective bargaining and the constructive settlement of disputes. We should also be guided by the overall legislative scheme which foresees a collective bargaining relationship as an ongoing process and which provides for a balance of power between the parties during this process.

In the present case, it must be recalled that CAW did not present an application to be certified as the bargaining agent for a group of unorganized employees. The application for review had been presented by CN on May 29, 1990 in the context of an established bargaining relationship that it had with several certified bargaining agents.

It should also be remembered that following the hearings with respect to the review application, the Board rendered its decision to consolidate the six units into one unit on July 10, 1992. The bargaining process, however, did not cease at that time. On the contrary, the parties followed the various procedures provided for by the Code, with the result that the employees of the five shopcraft units had acquired the right to strike and the employer had acquired the right to lockout and change the terms and conditions of employment. The Board's order of June 29, 1994 gave effect to the decision to consolidate which was reached approximately two years before and, as a result of the representative vote, certified the CAW as the bargaining agent of the consolidated unit in the place of the previously certified unions.

In the situation described above, by virtue of its certification, CAW succeeded as the bargaining agent for the same employees in the consolidated unit. The effect of a certification in such circumstances is to substitute the new bargaining agent in the existing bargaining relationship. Section 36(1)(c) states:

"36. (1) Where a trade union is certified as the bargaining agent for a bargaining unit,

(c) the trade union so certified is substituted as a party to any collective agreement that affects any employees in the bargaining unit, to the extent that the collective agreement relates to those employees, in the place of the bargaining agent named in the collective agreement or any successor thereto."

While section 36(1)(c) refers to the newly certified union being substituted in the place of the previous bargaining agent with respect to an existing collective agreement, a large interpretation is warranted. (See Bell Canada (1981), 43 di 238; [1981] 2 Can LRBR 284; and 81 CLLC 16,099 (CLRB no., 311).) This provision must be construed to refer to the entire bargaining process, that is the new bargaining agent is substituted in the place of its predecessor with respect to the rights and privileges of the unit(s) that exist at the time of substitution. This view derives from the terms that the trade union is substituted "to any collective agreement that affects any employees in the bargaining unit to the extent that the collective agreement relates to those employees". The certified bargaining agent is not limited to assuming the place of the former union with respect to the applicable collective agreement but continues in the place of its predecessor after the expiration of the collective agreement. Consequently, it "steps into the shoes" of its predecessor in all respects of the bargaining process.

The foregoing construction of section 36(1)(c) is consistent with the concept of continuity that this section is intended to provide. The purpose of this provision is to allow for an ongoing relationship between the parties which operates in a particular enterprise or industry. Such continuity allows for a change in bargaining agents without the loss of acquired rights. It also assures that one party does not gain an unfair advantage during the process.

The notion of maintaining continuity is a basic principle under the Code. It applies not only to a change in bargaining agents but also where there is a change of employer during the bargaining regime.

In the present case, CAW, by virtue of its certification, is substituted as the bargaining agent for the employees of each of the separate units and replaces the previously existing bargaining agents in all of their rights and privileges held at the time of substitution. In effect, CAW is in the same position as the bargaining agents it has replaced. CAW, therefore, not only assumes the status of each of the previous shopcraft unions but also continues the bargaining process from the point at which it left off. In short, during the transition period and until a new collective agreement is reached for the unit as a whole, all bargaining rights are maintained and each group of employees is governed by the existing terms and conditions of employment as well as by their acquired rights.

In the case of the employees who were in the carmen unit, the continuation of the bargaining regime means that the terms and conditions of their expired collective agreement are maintained and applied to them. CN cannot modify these terms and conditions and the employees have no right to strike.

The situation pertaining to the shopcraft employees differs. All the requirements of section 89 have already been met. Consequently, they legally have the right to strike

while CN has the right, as it did, to modify their terms of employment and remove the right to arbitration.

This right to strike necessarily continues after the consolidation took effect, as does the right of CN to lockout or to further modify the terms and conditions of employment. The Board's order and the ensuing bargaining process allows for the negotiation of a new collective agreement for the consolidated unit but does not have the effect of revoking existing rights.

IV

As already indicated, CN is approaching the situation as if it were a fresh certification. According to CN, following the consolidation order and the notice to bargain given by CAW on July 7, 1994, the right to strike previously acquired by the employees in the shopcraft units is lost but these employees are nevertheless governed by the terms and conditions of employment, without recourse to arbitration, that were imposed by CN on June 8, 1993, prior to the consolidation order.

This position, in my view, is untenable. It not only modifies the balance of power that the Code intended to preserve but also is contrary to sound labour relations.

The basis upon which CN was entitled to unilaterally change the terms and conditions of employment of its shopcraft employees prior to the consolidation order was the fact

that the right to strike or lockout had been achieved pursuant to section 89 of the Code. Given that the employer's right to modify working conditions is predicated upon the union's right to (declare a) strike, its actions can logically only have continued validity if the countervailing right remains. In other words, if the right to strike or lockout, established following the expiration of the existing collective agreements, has permitted CN to impose unilateral changes in working conditions, the right to strike must continue to exist until a new collective agreement is reached or, at a very minimum, as long as the unilateral terms instituted by CN continue to apply. Surely, CN cannot be found to be in the position to institute the terms of employment it wishes but the union somehow loses its collective right to respond (by means of strike action) because the Board has intervened and provided a consolidation order.

Section 36(1)(c) simply operates to replace CAW as the bargaining agent with respect to the previous units. The right to strike of the previous shopcraft units therefore necessarily survives the consolidation order. In the same manner, the employer's right to impose its unilateral conditions of employment which is predicated upon the existence of the right to strike, survives the consolidation order.

CN cannot now say that the right to strike does not exist on the grounds that the requirements of section 89 have not been met when CN's imposition of employment conditions could only have occurred once there had been compliance with section 89 of the Code.

Having already achieved a legal strike position, no further steps are required by the Code to exercise the right to strike. Furthermore, the notice to bargain given by CAW in July of 1994 does not alter or remove this acquired right.

CAW argued that a purposive interpretation should be applied with respect to the provisions of the Code. I fully agree with that approach, particularly in light of the fact that there are no set provisions contained in the Code which govern the aftermath of a consolidation. As stated by Pierre-André Côté in Interpretation of Legislation in Canada, second edition, (Cowansville (Québec) Canada: Les Éditions Yvon Blais Inc. (1991)),

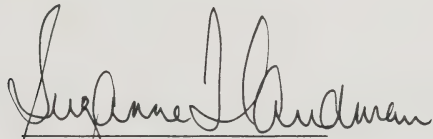
"If the law is silent or unclear, the judge is still required to make a decision. In doing so, he may quite possibly be required to define rules which go beyond the written expression of the statute, but which in no way violate its spirit."

(page 337)

To apply both sections 50 and 89 in a literal manner, as suggested by CN, to a situation so vastly different from an initial certification is inconsistent with the intent and spirit of the Code. Furthermore, a blind application of these provisions results in the eradication of acquired rights for one of the parties but not for the other, thus tipping the balance of power. Any interpretation of the Code which results in the removal of acquired rights or which alters the balance of power with respect to the

parties involved in a collective bargaining regime is contrary to the fundamental principles of labour relations.

For all the foregoing reasons, I would deny the application.



Suzanne Handman
Vice-Chair

information

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Summary

Communications, Energy, and Paperworkers Union of Canada, *applicant*, and Canadian Labour Force Development Board, *employer*.

Board File: 555-3767
CLRB/CCRT Decision no. 1093
December 2, 1994

Résumé

Syndicat canadien des communications, de l'énergie et du papier, *requérant*, et Canadian Labour Force Development Board, *employeur*.

Dossier du Conseil: 555-3767
CLRB/CCRT Décision n° 1093
le 2 décembre 1994

The applicant applied to the Board to be the certified bargaining agent for a group of employees employed at the Canadian Labour Force Development Board.

The CLFDB is 100% funded by the federal government. The Board determined that the funding support by the federal government does not affect the institution's constitutional character and that in order to determine its constitutional character CLFDB's operation must be examined as a going concern.

The regulation of labour relations is presumed to fall within the "Property and Civil Rights" aspect of provincial jurisdiction unless it is shown that the undertaking forms an integral part of federal jurisdiction. In the absence of constitutional facts showing the opposite, the presumption of provincial competency must prevail.

In the present case, it was incumbent on the applicant to prove the necessary constitutional facts to bring the unit sought within the ambit of federal jurisdiction. It failed to do so.

The application is accordingly dismissed.

Le requérant a présenté au Conseil une demande en vue d'être accrédité à l'égard d'un groupe d'employés qui travaillent pour le Canadian Labour Force Development Board.

L'employeur est financé à 100 % par le gouvernement fédéral. Le Conseil a jugé que ce financement n'influe aucunement sur le caractère constitutionnel de l'employeur et que, pour déterminer le caractère constitutionnel, l'entreprise de l'employeur doit être examinée en tant qu'entreprise active.

La réglementation des relations du travail relève implicitement de l'aspect «Propriété et droits civils» de la compétence provinciale à moins qu'on prouve que l'entreprise relève de la compétence fédérale. En l'absence de faits constitutionnels qui démontrent le contraire, la présomption de compétence provinciale prévaut.

En l'espèce, il incombe au requérant de prouver les faits constitutionnels pertinents pour que l'unité visée ressortisse à la compétence fédérale. Le requérant ne l'a pas fait.

La demande est donc rejetée.

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Reasons for decision

Communications, Energy, and Paperworkers
Union of Canada,

applicant,

and

Canadian Labour Force Development Board,

employer.

Board File: 555-3767
CLRB/CCRT Decision no. 1093
December 2, 1994

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances (on record):

Mr. Henri Gauthier, for the applicant; and

Messrs. E. Gérard Docquier and J. Laurent Thibault, for the employer.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

On June 9, 1994 the Applicant, Communications, Energy and Paperworkers Union of Canada (hereinafter "CEPUC"), filed an application with the Board, pursuant to section 24 of the Code, seeking to be certified as the bargaining agent for the following unit of employees:

"All those working at the Canadian Labour Force Development Board in Ottawa with the exception of the following: Labour Co-Chair, Business Co-Chair, Director of Planning and Operations and Director of Research and Policy."

CEPUC was aware that its application would raise the question of the Board's constitutional jurisdiction and accordingly filed a similar application with the Ontario Labour Relations Board. The certification application before the Ontario Board was adjourned *sine die* pending our determination of the constitutional issue.

II

The Canadian Labour Force Development Board (CLFDB) is a non-profit, independent national organization established in 1991 by the Government of Canada in response to the growing consensus that the labour market partners must have a greater role in addressing training and labour market concerns (CLFDB Annual Report 1992-1993, page 5).

It was incorporated by letters patent on June 25, 1991 under the provisions of Part II of the Canada Corporations Act, with the following mandate:

"The objects of the Corporation are to:

- 1. be an advocate for more training, higher quality training, and more accessible training in Canada;*
- 2. advise the Government of Canada on all aspects of training policy and programs; and*
- 3. make firm recommendations on:*
 - (a) standards for certification and training;*
 - (b) methods of reducing barriers to access to training;*

- (c) *measures to increase the co-ordination of income support and training;*
- (d) *measures to ensure that training programs contribute to employment equity for groups that are disadvantaged in the labour market; and,*
- (e) *the allocation of funds for training."*

The CLFDB's business is managed by a board of directors composed of 22 voting members nominated by organizations that represent the major labour market constituents. The voting membership consists of eight business and eight labour representatives, two representatives from the education/training community, and one representative from each of the four equity groups. There are also non-voting representational members: the Commissioner (Employers), Employment and Immigration Canada; the Commissioner (Workers), Employment and Immigration Canada; and senior officials representing the federal and provincial/territorial governments.

The Board of Directors is co-chaired by the Business and Labour Co-chairs and the CLFDB officers are the two Co-chairs and the Executive Director. The latter is the Chief Executive Officer and is not a member of the Board of Directors.

The Corporation's offices are located in the National Capital Region. However, under its by-laws, it may establish other offices elsewhere within Canada as it deems appropriate.

The CLFDB receives its funding from the Canadian government by virtue of a contribution agreement entered into with the Minister of Employment and Immigration (now the Minister of Human Resources Development) on May 23, 1991. Under that agreement, the government contributes the lesser of \$15 million or 100% of the eligible costs of CLFDB activities to a maximum of \$4 million per year for a period

of five years. In return, the CLFDB must prepare an annual business plan, in the form of a pro forma budget, which must be submitted to the government three months in advance of each fiscal year.

III

The relevant sections of the Code are:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

(d) a ferry between any province and any other province or between any province and any country other than Canada,

(e) aerodromes, aircraft or a line of air transportation,

(f) a radio broadcasting station,

(g) a bank,

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces;

(j) a work, undertaking or activity in respect of which federal laws within the meaning of the Canadian Laws Offshore Application Act apply pursuant to that Act and any regulations made under that Act;

...

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

5. (1) This Part applies in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of the employees of any such corporation, except any such corporation, and the employees thereof, that the Governor in Council excludes from the operation of this Part.

(2) The Governor in Council may, pursuant to subsection (1), exclude from the operation of this Part only those corporations in respect of which a minister of the Crown, the Treasury Board or the Governor in Council is authorized to establish or to approve some or all of the terms and conditions of employment of persons employed therein.

(3) Where the Governor in Council excludes any corporation from the operation of this Part, the Governor in Council shall, by order, add the name of that corporation to Part I or II of Schedule I to the Public Service Staff Relations Act.

6. Except as provided by section 5, this Part does not apply in respect of employment by Her Majesty in right of Canada."

IV

The regulation of labour relations falls within the "Property and Civil Rights" aspect of provincial jurisdiction unless it is shown that the undertaking forms an integral part

of federal primary jurisdiction over a federal subject under the Constitution Act, 1867 (see the Stevedoring case, [1955] S.C.R. 529). An undertaking falls under federal jurisdiction in two cases: it may be, in itself, a federal undertaking or it may be an integral part of a core federal undertaking.

It is readily apparent that the CLFDB does not fit in any of the descriptions contained in sections 2(a) to (g) or (j) of the Code; nor has Parliament declared it to be for the general advantage of Canada or for the advantage of two or more provinces pursuant to section 2(h); nor is it a Crown corporation to which the Code applies by virtue of section 5.

There is no core federal undertaking to which the CLFDB could either be related or of which it can be found to be an integral part. The only determination left for the Board is whether the CLFDB is, in itself, a federal undertaking. If so, it must be a federal undertaking which falls outside the exclusive jurisdiction of the provinces pursuant to section 2(i) of the Code.

V

The argument that the CLFDB falls within federal competence is essentially and entirely based upon the fact that its funding is wholly controlled by the federal government. According to the labour relations officer's report:

"...the Government of Canada is responsible for 100% funding of the CLFDB, including expenditures such as compensation to Board Members, rental of premises, salaries and wages of employees..."

Although there are numerous cases dealing with constitutional determinations for labour relations purposes, tribunals have rarely dealt with circumstances similar to the

present. Nonetheless, one principle remains clear: federal funding of an institution does not, in itself, affect the constitutional determination.

That position was clearly established by the Supreme Court of Canada in YMHA Jewish Community Centre of Winnipeg Inc. v. Brown, [1989] 1 S.C.R. 1532. The case concerned a non-profit organization that participated in a federal job creation program. The Canadian government paid the base unemployment insurance benefits for employees, while the YMHA was responsible for topping up this amount in accordance with established rates. In a complaint filed pursuant to The Payment of Wages Act before the Manitoba Board, the YMHA argued that the job creation program falls within the exclusive federal jurisdiction over unemployment insurance as set out in section 91(2A) of the Constitution Act, 1867 and, for that reason, its activities could not be found to fall within provincial jurisdiction.

The Supreme Court of Canada, *per* L'Heureux-Dubé J., rejected that argument and ruled that the power to establish a job creation program "*is derived from the federal spending power*" (page 1548), and that the exercise of that federal spending power does not presuppose an incursion of the federal authority in activities of a provincial nature:

"... However, while Parliament may be free to offer grants subject to whatever restrictions it sees fit, the decision to make a grant of money in any particular area should not be construed as an intention to regulate all related aspects of that area. Thus, a decision to provide a job creation grant to an organization such as the YMHA should not be construed, without other evidence, as an intention to remove provincial labour law jurisdiction over the project.

On several occasions this Court has determined that the mere spending of federal money cannot bring a matter which is otherwise provincial into federal competence. The role of federal funding in determining questions of legislative competence has also been considered by this Court in Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031. In that case, a company named Four B was incorporated pursuant to the laws of Ontario to carry on business as a shoe manufacturer on an Indian reserve. While the company was located on the reserve, it was

privately owned and operated. The company received certain sums of money as federal grants advanced pursuant to programmes of the Department of Indian Affairs and Northern Development. The issue which arose in Four B was whether the provincial Labour Relations Act applied, and whether the Labour Board had jurisdiction to make the particular decisions under review.

Beetz J. for the majority of this Court indicated that the actual business carried out by Four B was clearly provincial. He wrote, at p. 1046:

'There is nothing about the business or operation of Four B which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, The Labour Relations Act applies to the facts of this case, and the Board has jurisdiction.'

Beetz J. tersely rejected the proposition that the federal subsidy given to Four B could bring the company within the jurisdiction of Parliament, at p. 1050:

'I do not see much substance either in the argument the Four B was federally subsidized. The Government of Canada subsidizes a great many industries without Parliament thereby acquiring the power to regulate their labour relations.'

Similarly, in the present case, I find it difficult to believe that simply by providing federal money to promote employment in a region or sector, the federal government can obtain jurisdiction over the worker employed by virtue of the grant."

(at pages 1549-1550; emphasis added)

Similarly, the Quebec Superior Court has, on two occasions, held that non-profit organizations established to administer youth programs financed by the Secretary of State and the Canadian International Development Agency (CIDA) were provincial businesses subject to provincial labour relations legislation. (See Jeunesse Canada

Monde - Canada World Youth c. Denis, [1987] R.J.Q. 181, and Commission des normes du travail c. OPCAN, file no. 500-05-009205-806, 1984/05/07 (C.S. Montréal)).

In Heritage Canada Foundation (1988), 73 di 202 (CLRB no. 684), the Board examined a problem similar to the one in the instant case. The constitutional determination to be made in that case concerned a non-profit institution incorporated by letters patent under the Canada Corporations Act. The Heritage Canada Foundation was created in 1973 to preserve historic sites in Canada and to demonstrate and encourage their preservation. As is the case with the CLFDB, the Foundation's business was managed by a board of directors, and the initial and main source of financing was the federal government.

The Board first noted that federal government funding has no effect on the constitutional determination:

"There are many provincial institutions that receive financial support from the federal government or its agencies but this does not affect their constitutional character."

(page 207)

and reiterated that the determining factor in constitutional characterization is the nature of the employer's operations. It found that the Foundation's activities fall within the provincial jurisdiction under the heading of "Property and Civil Rights in the Province":

*"As we said before, what does matter is the ongoing operations of the Foundation as a going concern. When we look at its operations, it is readily seen that the whole being of the Foundation is directed at **land and buildings**. It is our respectful opinion that the business of the foundation falls squarely within the scope of section 92(13) of the Constitution Act under the heading of 'Property and Civil Rights in the Province'. This is*

clearly within the exclusive jurisdiction of the provinces; therefore, it cannot come within section 2(i) of the Code."

(pages 207-208; emphasis added)

In the instant case the fact that the source of funding and the distribution of those funds fall within the operation of the federal Government (as disclosed in the labour relations officer's report), or that the corporation has its genesis as a federal corporate entity, (in Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan, [1980] 1 S.C.R. 433, page 448, the Supreme Court held that the origin of incorporation has no bearing on the constitutional jurisdiction over labour relations), is not relevant to the determination of CLFDB's constitutional character. The decisive factor in determining constitutional jurisdiction over labour matters is the **nature of the operation**, not the character of the employer (C.L.R.B. v. City of Yellowknife, [1977] 2 S.C.R. 729). In order to determine whether the CLFDB falls within the definition of "federal undertaking or business" as contained in section 2 of the Code, the Board must therefore look at the nature of its operation and examine *"the normal or habitual activities of the business as those of a going concern"* (Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115, page 132); and Heritage Canada Foundation, supra.

V

What is the nature of the CLFDB business?

As detailed in its letters patent, the CLFDB's mandate and activities all relate to the subject of education and training: for example, promoting more accessible, higher quality training; advising on all aspects of training policy and programs; formulating and recommending standards of training to increase and facilitate training; etc.

Although **training** is not a subject specifically mentioned in the Constitution Act, 1867, it is common knowledge that federal and provincial governments negotiate agreements in order to promote and facilitate training through the federal spending power.

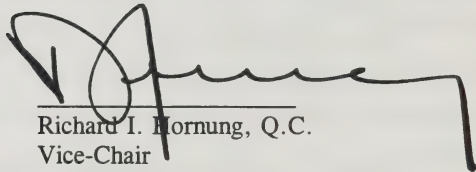
Under which heading of division of power of the Constitution Act, 1867 does training therefore fall? Does it fall under federal jurisdiction as part of the "Unemployment Insurance" program (section 91(2A)); or, is it rather a matter of provincial competence falling within "Education" (section 93), "Matters of merely local or private Nature in the Province" (section 92(16)), or "Property and Civil Rights in the Province" (92(13))?

There is currently considerable debate over the constitutional jurisdiction which governs training. It is not a debate we need to examine in order to make a determination in the present matter.


The underlying governing rule is that the regulation of labour relations falls within the "Property and Civil Rights" aspect of provincial jurisdiction unless it is shown that the undertaking forms an integral part of primary federal jurisdiction over a federal subject under the Constitution Act, 1867 (see the Stevedoring case, *supra*). While it is apparent that a genuine difference of opinion exists with respect to the jurisdiction over training, for our purposes, in the absence of a clear resolution of the debate, and of constitutional facts showing the opposite, the presumption of provincial competency in labour relations regulation must prevail (see Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754). In cases such as the present, it is incumbent on the applicant to allege and prove the necessary constitutional facts to bring the unit sought within the ambit of federal jurisdiction. CEPUC failed to do so.

Accordingly, we find that the CLFDB falls within the legislative jurisdiction of the province, and the Board does not have constitutional jurisdiction to certify the applicant union in the present case.

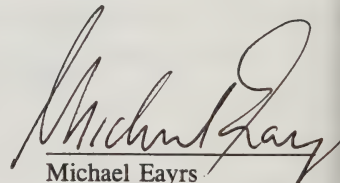
The application is dismissed.



Richard I. Hornung, Q.C.
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

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Summary

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), *applicant*, International Union of Operating Engineers, Local 721B, *bargaining agent*, and Acadian Lines Limited, *employer*.

Board File: 555-3794

CLRB/CCRT Decision no. 1094
December 12, 1994

Application for certification filed under section 24 of the Canada Labour Code (Part I - Industrial Relations). The application is a raid application which is found to be timely pursuant to section 24(2)(c) of the Code.

The employer, which operates scheduled passenger bus service in the province of Nova Scotia and on-demand charter bus service to points in Canada and the United States, objects to the Board's jurisdiction claiming its interprovincial charter operations are not sufficient to make it federal.

Résumé

Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale, du transport et autres du Canada (TCA-Canada), *requérant*, Union internationale des opérateurs de machines lourdes, section locale 721B, *agent négociateur*, et Acadian Lines Limited, *employeur*.

Dossier du Conseil: 555-3794

CLRB/CCRT Décision n° 1094
le 12 décembre 1994

Demande d'accréditation présentée en vertu de l'article 24 du Code canadien du travail (Partie I - Relations du travail). Il s'agit d'une demande de maraudage qui, selon le Conseil, a été présentée dans les délais prévus à l'alinéa 24(2)(c) du Code.

L'employeur, qui exploite un service régulier d'autocars en Nouvelle-Écosse ainsi qu'un service d'autocars nolisés à destination de localités au Canada et aux États-Unis, conteste la compétence du Conseil, soutenant que ses activités interprovinciales ne sont pas suffisantes pour en faire une entreprise fédérale.



The Board analyses the operations of the employer and concludes that it is an interprovincial transportation undertaking.

Le Conseil a examiné les activités de l'employeur et conclut qu'il s'agit d'une entreprise de transport interprovinciale qui relève de sa compétence.

The Board orders a vote to determine which union will become the bargaining agent for the unit.

Le Conseil ordonne la tenue d'un scrutin afin de déterminer quel syndicat représentera l'unité en titre d'agent négociateur l'unité de négociation.

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Reasons for decision

National Automobile, Aerospace,
Transportation and General Workers Union of
Canada (CAW-Canada),

applicant,

International Union of Operating Engineers,
Local 721B,

bargaining agent,

and

Acadian Lines Limited,

employer.

Board File: 555-3794

Decision no. 1094

December 12, 1994

Appearances (on record)

Mr. Larry Wark, Area Director, Atlantic Provinces, National Automobile, Aerospace,
Transportation and General Workers Union of Canada, for the applicant;

Mr. John C. MacPherson, Esq., for the bargaining agent;

Mr. John D. Plowman, Esq., for the employer.

The Board was composed of Mr. J. Philippe Morneault, Vice-Chair, and
Messrs. Calvin B. Davis and Michael Eayrs, Members.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chair.

This is an application for certification filed with the Canada Labour Relations Board pursuant to section 24 of the Canada Labour Code (Part I - Industrial Relations) on August 9, 1994 by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (the applicant). It is a raid application since the International Union of Operating Engineers, Local 721B (Local 721B or the bargaining agent), was certified by the Nova Scotia Labour Relations Board in 1985 to represent separate units of office/terminal employees and drivers/mechanics.

Local 721B and Acadian Lines Limited (the employer or Acadian), negotiated a single collective agreement for all employees covered by both certification orders. The most recent collective agreement between Acadian and Local 721B, which was for a term of three years, expired on December 31, 1993. This application is therefore timely by virtue of section 24(2)(c) of the Code which states that:

"24. (2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

...

(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation."

The applicant is applying for certification to represent a bargaining unit consisting of all office/terminal employees and drivers/mechanics of the employer. This unit consisted of approximately one hundred and one (101) employees on the date the application was filed with the Board and is the bargaining unit covered by the expired collective agreement between the employer and Local 721B. All three parties agree that it is the existing bargaining unit which is appropriate for collective bargaining. The Board agrees, assuming it has jurisdiction to grant this application, that the unit is a unit appropriate for collective bargaining in the circumstances of this case.

The only real issue between the parties, apart from Local 721B's request that a representation vote be held in view of the fact that this is a raid situation, is that the employer has raised the question of whether the Board has constitutional jurisdiction with respect to this application.

I

The facts concerning the nature of the employer's business which are material to this case are summarized below.

Acadian Lines Limited is in the business of transporting passengers by bus. It operates scheduled routes within the Province of Nova Scotia and provides on-demand charter motorcoach service. Acadian has twenty-nine (29) buses in its fleet. All of Acadian's scheduled routes are within the Province of Nova Scotia but often connect with other companies for the purpose of interlining passengers and parcel express.

The employer also has a pooling agreement with SMT (Eastern) Limited, a New Brunswick bus transportation company, under which the two companies interchange equipment to facilitate the transfer of passengers and parcel express. When they connect at Acadian's Amherst terminal, the bus drivers exchange equipment. The Acadian driver takes the SMT bus with passengers destined for points in Nova Scotia and the SMT driver takes the Acadian bus with passengers headed for New Brunswick and beyond. When Acadian needs to add an extra bus to its scheduled service to Amherst to deal with an overload situation, the Acadian driver will occasionally take the bus on to SMT's terminal in Moncton, New Brunswick, if SMT cannot place a driver in Amherst to drive the overload bus to the Moncton terminal. This has occurred eight (8) times during the year prior to the date of the application and is not a frequent requirement.

With these interline arrangements in the bus transportation industry, it is possible to purchase a ticket from Acadian for any destination in Canada and to Bangor, Maine, in the United States. Revenue from such a trip is divided among the carriers according to the cost of travel in each carrier's territory, less agreed amounts of commission. Acadian also offers parcel express service on its scheduled line runs. As the timetable advertises, Acadian offers "Same day dependable parcel express to most Maritime points on scheduled motorcoach service". Deliveries to points in New Brunswick and Prince Edward Island are accomplished through the employer's interlining arrangements with SMT. Acadian keeps all revenue going to New Brunswick, and SMT retains all revenue coming into Nova Scotia. The revenue split for parcel express, excluding the arrangement with SMT, is determined by the number of carriers operating between the point of origin and destination in accordance with the interline arrangements in place in the bus transportation industry.

Acadian is authorized by two licenses issued by the Nova Scotia Utility and Review Board to operate scheduled passenger and parcel express services in Nova Scotia and to operate specialty charter route passenger service to all points in Canada and the United States. Acadian is also the holder of operating authority issued by the Interstate Commerce Commission permitting Acadian to operate in the United States. The employer presently maintains licensing and fuel tax requirements in thirteen (13) states along the Eastern Seaboard. When requested to provide charter service to other states, Acadian makes the necessary arrangements on an individual trip basis.

With respect to extraprovincial charter service, Acadian sometimes subcontracts to another bus transportation company known as Airport Transfer Ltd. (Nova). Nova is owned and controlled by the same family holding company which owns and controls Acadian. In the year which preceded the application, Acadian made thirty-three (33) extraprovincial trips under subcontract for Nova and Nova made sixteen (16) extraprovincial trips under subcontract to Acadian.

Between August 1, 1993 and July 31, 1994, the employer made 1002 charter trips of which 858 were local charter trips within Nova Scotia, and 144 were extraprovincial charter trips. The extraprovincial charter trips represented 1.22% of the total trips completed during the period. According to the employer, its extraprovincial business represented 3.79% of the total kilometres travelled during that period and constituted 3.5% of its total revenue.

II

Based on those facts, the employer submits that given the small number of extraprovincial trips, this aspect of its business should, in all circumstances, be characterized not as continuous and regular, but rather as casual. In reviewing all of the leading cases in its submission, the employer relied specifically on the following cases: Regina v. Manitoba Labour Board Ex parte Invictus Ltd. (1967), 65 D.L.R. (2d) 571 (Man. Q.B.); Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association 1688 et al. (1980), 117 D.L.R. (3d) 400 (H.C.J. Ont., C. div.); Ottawa Taxi Owners and Brokers Association (1984) 56 di 73 (CLRB no. 464); and The Gray Line of Victoria Ltd. (1989), 77 di 169; and 5 CLRBR (2d) 226 (CLRB no. 741).

Section 2 of the Canada Labour Code defines federal work, undertaking or business as follows:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province, ... "

This paraphrases section 92(10)(a) of the Constitution Act, 1867 which reads as follows:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,

...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province."

The seminal case with respect to the determination of whether a transportation operation falls within federal or provincial jurisdiction is Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657; and [1954] A.C. 541 (P.C.) where the Privy Council stated:

"...The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is interprovincial. Just as the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case so the question whether it is a camouflaged local undertaking masquerading as an interconnecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an Act or Regulation."

(pages 680; and 582)

The main consideration here, as refined by the leading cases, is whether the extraprovincial aspect of a transportation operation that connects provinces or extends

beyond the limits of a province within the meaning of section 92(10)a) is regular and continuous. The leading cases clearly establish that the test that must be applied to decide if the extraprovincial aspect of the business is regular and continuous must be qualitative as opposed to quantitative. For example in Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al. (1983), 44 O.R. (2d) 560; 4 D.L.R. (4th) 452; and 84 CLLC 14,006 (C.A.) Cory, J.A. (as he then was) had this to say:

"There is a long history of decisions pertaining to the trucking and transportation industry. These authorities have rejected a quantitative approach which would determine the result based upon a comparison of the extraprovincial business to the business carried on within the province. Instead, the decisions have turned upon a finding that the extraprovincial operation was a continuous and regular one. If the extraprovincial operation was found to be continuous and regular, then the undertaking was determined to be one which connected provinces. There is no reason, in my view, to depart from that line of decisions which has for many years governed the transportation industry. The test used in those authorities is a reasonable one and it can be readily applied."

(pages 569; 460-461; and 12,030)

Regina v. Cooksville Magistrates Court, Ex parte Liquid Cargo Lines Ltd., [1965] 1 O.R. 84; and (1964), 46 D.L.R. (2d) 700 (H.C.J. Ont.) is very instructive on the application of this test where the trips are not made at fixed times in accordance with a predetermined schedule. It states:

"In my view, the fact that many of the applicant's extraprovincial trips are not made at fixed times in accordance with a predetermined schedule does not compel the conclusion that its activity in that regard is not continuous and regular. Viewed from the point of view of the applicant company, it is clear that its customers are provided with extra-provincial service consistently and without interruption whenever they apply to the applicant for such service. The applicant stands ready at any time to engage in hauls outside the boundaries of the Province of Ontario at the instance of any of its customers,

and for that purpose has gone to the pains and expense of acquiring transport permits and licences from a number of jurisdictions. Further, the evidence is clear that it has made such trips frequently during the period for which figures have been provided."

(pages 88-89; and 704-705)

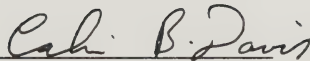
In our view, the proportion of business test propounded in Re Windsor Airline Limousine Services Ltd., supra was completely discredited in Re Ottawa-Carleton Regional Transit Commission, supra. If the percentage of business is to be used at all, it can only be used to determine whether the traffic is regular and continuous and not as a test per se. Furthermore, we believe that it is only useful where regularity and continuity of traffic cannot otherwise be readily determined. This is not this case.

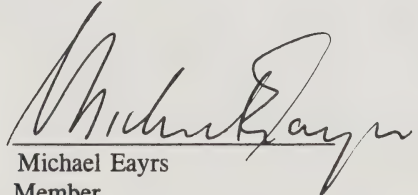
In this case, the employer holds itself out to the public as ready, willing and able to provide motorcoach charter service throughout Canada and the United States. It holds extraprovincial operating authorities from the Nova Scotia Utility and Review Board to operate passenger and parcel. It operates specialty charter route passenger services to all points in Canada and the United States and also holds operating authority issued by the Interstate Commerce Commission in the United States for thirteen (13) states along the Eastern Seaboard. While the extraprovincial charter trips are based on demand only, the evidence shows that whenever such a trip is requested, it is made; thus the extraprovincial part of the employer's business which is integrated in its whole operation appears to us to be of the regular and continuous nature that is necessary to convert Acadian from a provincial undertaking to a federal work, undertaking or business within the scope of section 92(10)(a) of the Constitution Act, 1867 and we so find.

Therefore, in accordance with Board policy in raid situations established in Bell Canada (1979), 30 di 112; and [1979] 2 Can LRBR 435 (CLRB no. 192); and CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393; and [1980] 1 Can LRBR 270

(CLRB no. 151), the Board orders that pursuant to section 29(1) of the Code, a representation vote be taken among the employees in the bargaining unit for the purpose of determining which trade union, the applicant or the incumbent, the employees wish to have represent them as their bargaining agent. The eligibility date for the vote will be the date of this decision. This is an interim decision in accordance with section 20(1) of the Code.


J. Philippe Morneault
Vice-Chair


Calvin B. Davis
Member


Michael Eayrs
Member

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Summary

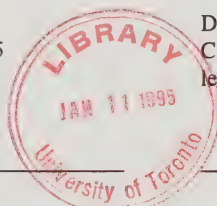
Letters Carriers Union of Canada, Raymond Taylor, Kenneth Doubt, Lorraine Tew, Michael Villemaire, *complainants*, Canada Post Corporation, *respondent* and Canadian Union of Postal Workers, *intervenors*.

Board File: 745-4916
CLRB/CCRT Decision no. 1095
December 9, 1994

Résumé

L'Union des facteurs du Canada, Raymond Taylor, Kenneth Doubt, Lorraine Tew, Michael Villemaire, *plaignants*, Société canadienne des postes, *intimée* et Syndicat des postiers du Canada, *intervenants*.

Dossier du Conseil: 745-4916
CLRB/CCRT Décision n° 1095
le 9 décembre 1994



The Letter Carriers Union of Canada (LCUC) and individual complainants filed a complaint alleging that the Canada Post Corporation (the employer) had violated sections 94(1)(a) and 94(3)(a)(i) of the Canada Labour Code by refusing to grant leaves without pay to employees for the purpose of promoting and advancing the interests of LCUC. There was a leave without pay provision in the applicable collective agreement between the Corporation and the Canadian Union of Postal Workers (CUPW), the incumbent union.

The employer admitted it had initially granted leaves without pay to some LCUC supporters, but that it had reversed its decision following receipt of a letter from CUPW asking the employer to remain neutral during the raid attempt by LCUC. The employer's justification before the Board was that if it had granted leaves of absence to employees for participating in activities aimed at displacing CUPW, this would have been viewed as a non-neutral action in favour of LCUC, and would have been a violation of the Code.

L'Union des facteurs du Canada (UFC) et d'autres plaignants ont déposé une plainte auprès du Conseil alléguant que la Société canadienne des postes (l'employeur) a violé l'alinéa 94(1)a) et le sous-alinéa 94(3)a)(i) du Code canadien du travail en refusant d'accorder des congés sans solde à des employés qui voulaient encourager l'UFC et promouvoir ses intérêts. La convention collective conclue par l'employeur et le syndicat accrédité, le Syndicat des postiers du Canada (SPC), contient une disposition permettant l'obtention de congés sans solde.

L'employeur reconnaît qu'il a d'abord accordé des congés sans solde aux partisans de l'UFC, mais qu'il est revenu sur sa décision après avoir reçu du SPC une lettre lui demandant de demeurer neutre au cours de la campagne de maraudage. L'employeur soutient devant le Conseil que s'il avait autorisé les congés sans solde des employés qui voulaient participer aux activités visant à remplacer le SPC, ce geste aurait été perçu comme un geste d'appui envers l'UFC et aurait constitué une violation du Code.

The Board affirmed that section 94(1)(a) must be read liberally and with a remedial eye. In a raiding situation, the Board must strike the balance between the divergent interests of the two competing unions. The activities protected by sections 8(1) and 94(1)(a) of the Code, e.g., persuading employees to become a member of a union, are essential during raids. The Board examined the employer's justification and the meaning of neutrality in a raid situation. The Board found that the employer's departure from its previous interpretation and application of the leave provision was the key element. The employer had granted such leave without pay during the previous raiding campaign.

The Board declared that the employer had violated section 94(1)(a) of the Code in refusing to grant or in cancelling leave without pay to employees known or identified in the 1995 raiding campaign as LCUC's supporters, and ordered the employer to grant, according to the interpretation and application of collective agreement that existed until July, 1994, requests for leave without pay to employees who wished to promote and advance LCUC's interests in the 1995 raiding campaign.

With respect to the other part of the complaint, the employer explained the context and the basis of its decision and the Board was satisfied that there was no violation of section 94(3)(a)(i) of the Code. The Board found that the employer's behaviour was not tainted with anti-union animus. There was nothing to indicate that the employer intended to deprive the supporters of LCUC of the freedom to exercise their right to associate.

Le Conseil juge que l'alinéa 94(1)a) doit être interprété librement, dans une perspective réparatrice. Dans le cas d'un maraudage, le Conseil doit équilibrer les intérêts divergents des deux syndicaux rivaux. Les activités visées par le paragraphe 8(1) et l'alinéa 94(1)a) du Code, par exemple persuader des employés de devenir membres d'un syndicat, sont essentielles au maraudage. Le Conseil s'est penché sur les motifs invoqués par l'employeur et sur le sens de la notion de neutralité dans le contexte d'un maraudage. Le fait que l'employeur a modifié l'interprétation et l'application des dispositions de la convention collective régissant les congés constitue, de l'avis du Conseil, l'élément clé de cette affaire, puisque l'employeur a en effet accordé ce genre de congés lors du dernier maraudage.

Le Conseil déclare que l'employeur a violé l'alinéa 94(1)a) du Code lorsqu'il a refusé ou annulé les congés sans solde que lui avaient demandés des partisans reconnus de l'UFC au cours de la campagne de maraudage de 1995. Il ordonne à l'employeur d'accorder aux employés qui désirent faire connaître l'UFC et promouvoir ses intérêts au cours de la campagne de maraudage de 1995 les congés sans solde demandés à cette fin, en se conformant à l'interprétation et à l'application de la convention collective qui était en vigueur jusqu'en juillet 1994.

Quant à l'autre aspect de la plainte, l'employeur a précisé le contexte et le fondement de sa décision et le Conseil est convaincu qu'il n'y a pas eu violation du sous-alinéa 94(3)a)(i) du Code. Le Conseil est d'avis que l'employeur n'a pas fait preuve de sentiment antisyndical, puisque rien n'indique qu'il voulait priver les partisans de l'UFC de leur droit de s'associer.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Letter Carriers Union of Canada,
Raymond Taylor,
Kenneth Doubt,
Lorraine Tew,
Michael Villemaire,

complainants,

and

Canada Post Corporation,

respondent,

and

Canadian Union of Postal Workers,

intervenor.

Board File: 745-4916
CLRB/CCRT Decision no. 1095
December 9, 1994

The Board was composed of Ms. Louise Doyon, Vice-Chair, Mr. Calvin B. Davis and Ms. Sarah E. FitzGerald, Members. A hearing was held on November 1st, 1994, at Ottawa.

Appearances

Mr. Dougald E. Brown, accompanied by Mr. M. Villemaire, for the complainants; Mr. John West, accompanied by Mr. André Sauriol, for the respondent; and Mr. Thomas A. McDougall, Q.C., assisted by Mr. R. Aaron Rubinoff, accompanied by Mr. Darrell Tingley, for the intervenor.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The procedure

On September 28, 1994, the Letter Carriers Union of Canada (LCUC) and individual complainants, all employees of Canada Post Corporation (CPC), filed with the Board a complaint alleging that CPC had violated sections 94(1)(a) and 94(3)(a)(i) of the Canada Labour Code.

These sections read as follows:

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,..."

The complainants allege that CPC contravened the Code by refusing to grant leave without pay to a number of letter carriers and mail service couriers who, with the knowledge of the employer, were active in the affairs of the LCUC. These employees had sought leave for the purpose of promoting and advancing the interests of the LCUC, specifically to participate in the 1995 raiding campaign against CUPW.

The complainants are asking the Board to declare that Canada Post has violated the Code and to order the corporation to grant the requested leave without pay to each of the individual complainants.

The employer, in its written reply, admitted that it had initially granted leave without pay to the complainants, but had reversed its decision following a letter dated June 9, 1994 from Mr. D.W. Tingley, National President of the Canadian Union of Postal Workers (CUPW). In his letter, Mr. Tingley asked the employer to remain neutral vis-à-vis LCUC's efforts to displace CUPW as the certified bargaining agent for the operational bargaining unit. It was the employer's position that if it had granted a leave of absence to employees who would be participating in activities aimed at displacing CUPW, this would have been viewed as a measure in favour of LCUC, and would have entailed a violation of its obligations under the Code.

CUPW filed a request to intervene on the ground that it was already directly involved in the matter and also that it would be directly affected by the outcome of the instant complaint, given its status as the incumbent bargaining agent representing the group of employees that the applicant wished to represent. On October 18, 1994, the Board granted intervenor status to CUPW.

A public hearing was held in Ottawa on November 1st, 1994.

II

At the outset of the hearing, the Board dealt with the burden of proof and the matter of which party would submit its evidence first. The Board decided that it would follow its usual practice with respect to this type of complaint, in accordance with section 98(4) of the Code. The employer was therefore asked to proceed first with its evidence, since the complaint alleged a violation of sections 94(1)(a) and 94(3)(1)(a).

Both the parties and CUPW advised the Board that they would not add oral evidence to their written submissions, and that they would rely on the parties' submissions and other documentation on file.

III

1. Background

A brief history of the events of the last few years will help understand the context of this complaint. In 1988, the Board determined that it was appropriate to merge into a single bargaining unit, various categories of employees then represented by CUPW, LCUC and other smaller employee associations. A representation vote was held in 1989 and CUPW won the bargaining rights. The Board then certified CUPW for employees in the operational bargaining unit. Following the Board's decision, LCUC attempted to organize a raid against CUPW in 1990. That raid was unsuccessful. In 1991, there was another unsuccessful attempt to displace CUPW as the certified bargaining agent. This raid was conducted by the International Brotherhood of Electrical Workers (IBEW) and was supported by employees identified as supporters of LCUC.

2. The relevant facts

The relevant facts as substantiated in the file and presented by counsel at the hearing can be summarized as follows.

- 1) The collective agreement between CPC and CUPW expires January 31, 1995.
- 2) This collective agreement contains an unpaid leave provision that reads as follows:

"27.09 Leave Without Pay for Group 2 PO-External

The Corporation shall grant leave without pay for a period of up to a maximum of three (3) months to an employee who requests such leave in writing for good and sufficient cause provided:

- (i) the employee gives reasonable advance notice of the period requested, and*
- (ii) notwithstanding any other provision of this Agreement, through consultation between the Local and the Corporation agreement is reached on the method to be used to cover the absence."*

3. On June 9, 1994, Mr. Tingley wrote to Mr. George C. Clermont, President and Chief Executive Officer of CPC to apprise him of the fact that members of CUPW had received a LCUC special bulletin indicating that LCUC had launched the 1995 organizing campaign in order to displace CUPW as the bargaining agent of the employees of CPC, including letter carriers and mail service couriers. Mr. Tingley requested that the employer remain neutral before and during the raid. Mr. Tingley put his request to Mr. Clermont in the following words:

"This request is based on the total involvement of the Canada Post Corporation in support of the IBEW/LCUC raid in 1991. I have highlighted a few examples to refresh our memories:

- (a) access to postal facilities by IBEW organizers;*
- (b) installation of bulletin boards (complete with glass and locks) for IBEW raid material;*
- (c) granting of leave without pay for letter carriers and mail service couriers to work on the raid;*
- (d) providing mailing lists to IBEW/LCUC organizers."*

(emphasis added)

Mr. Tingley went on to say:

"We hope the Corporation does not have any false illusions of the raid succeeding and of using it as a tool to delay negotiations. The 1991 IBEW/LCUC raid did not derail negotiations and Canada Post's involvement only helped to poison the relationship between the Union, its members and the Corporation and its representatives."

4. Following Mr. Tingley's letter, the employer advised its supervisory personnel, on July 21, 1994, that leave without pay pursuant to section 27.09 of the collective agreement should be granted for good and sufficient reason. It also advised that leave without pay granted for the unique purpose of working for LCUC's raiding campaign would not meet that requirement.

5. Despite this internal directive, leaves without pay were granted during the following weeks to employees who intended to work on the LCUC campaign.

6. In August, September and October, CUPW renewed its objections to the employer. At the request of CUPW, the employer then cancelled or refused leave without pay to a number of employees that CUPW had investigated and identified as supporters of LCUC.

7. In most cases, the leaves that were cancelled had been requested by the employees for personal or family reasons. CPC nevertheless cancelled the leaves, following CUPW's identification of the employees as LCUC's supporters.

8. CPC was aware that these requests for leave had been submitted for the purpose of working for LCUC. CUPW was also well aware of that reality, since it provided the employer with the names of the employees to whom leave should be refused or cancelled if already granted.

9. The evidence shows that, during the 1991 campaign, leave without pay pursuant to section 27 of the collective agreement had been granted to employees who wished

to participate in the IBEW/LCUC raiding campaign and that this situation had not been brought before this Board or before an arbitrator at that time or at any other time before the latest 1995 LCUC campaign.

10. The employer never alleged, in cancelling or refusing the leaves without pay, that it was doing so for any operational reason or any other legitimate business interest.

11. On September 14, 1994, solicitors for LCUC advised CPC that denial of leave without pay resulted in preferential treatment of CUPW and was detrimental to the LCUC campaign. LCUC's position was that CPC should respect the prior interpretation and application of the collective agreement established during the 1991 raiding campaign by which leave without pay to participate in that campaign was granted pursuant to the same provision of the collective agreement.

12. On September 21, 1994 in reply to the correspondence from LCUC, solicitors for CUPW informed the employer that, notwithstanding any practice that may have been incorrectly established in 1991, it was in disagreement with LCUC's position that leave without pay pursuant to section 27 of the collective agreement could be granted for raiding purposes.

Decision

I

The issues before the Board are summarized below.

Firstly, does the refusal and cancellation of leave without pay to LCUC supporters, who wished to take part in the lawful activities of their chosen union, unlawfully hinder these employees from participating in the formation or the administration of a trade union, such that the employer can be said to have violated section 94(1)(a)? In other words, does the basic freedom to join and participate in the lawful activities

of a trade union include, in the circumstances of the present case, unpaid time off from work for union organizing?

Secondly, based on the evidence in this case, is the employer discriminating against certain employees with respect to a term or condition of employment because these employees are participating in the promotion, formation or administration of the LCUC, contrary to subsection 94(3)(a)(i)?

II

Paragraph 8(1) of the Code reads as follows:

"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."

Justice George Adams, in Canadian Labour Law, 2d ed. (Ontario: Canada Law Book Inc., 1994) describes these provisions by saying:

"Freedom of association, the right to organize and the principle of free collective bargaining are concepts fundamental to the system of industrial relations established by statute in each of the eleven Canadian jurisdictions. ..."

(page 10-1)

The principal means of protection of employee rights under section 8(1) of the Code resides in section 94(1)(a). This section prohibits employers from interfering with the formation or administration of, or representation by, trade unions. As section 8 itself is declaratory, section 94(1)(a) must be read liberally and with a remedial eye.

In Canada Post Corporation (1985), 63 di 136 (CLRB no. 544), the Board had this to say concerning the purpose of section 94(1)(a):

"The general purpose of this provision is to prohibit two labour relations practices in which some employers indulge:

'... The first is the domination or attempted domination of the formation and administration of a trade union and the domination or attempted domination of the representation of employees by a trade union. The second is interference with the formation and administration of a trade union or interference with the representation of employees by a trade union.'

(Royal Bank of Canada (1980), 42 di 125 (CLRB no. 279), page 164)

This prohibition of section 184(1)(a) [now 94(1)(a)] is designed to give meaning to the basic freedoms spelled out in section 110(1) [now 8(1)] of the Code (Loomis Armored Car Service Ltd. et al. (1983), 51 di 185 (CLRB no. 408), page 200), which reads as follows:

"110. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."

Precedent has established that the scope of section 184(1)(a) [now 94(1)(a)] is broad enough to encompass all the rights embodied in section 110(1) [now 8(1)] that are not specifically protected by section 184(3) [now 94(3)] of the Code. In short, section 184(1)(a)[now 94(1)(a)] is an omnibus provision, a shield that protects against employer interference with all the basic rights that the Code confers on employees. ..."

(page 154; emphasis added)

The Board added:

"... section 184(1)(a) [now 94(1)(a)] is a necessary corollary to the basic right of an employee to join a trade union. It protects not only the exercise of an employee's right to be represented, but also the right of his union to do its job and to represent him without interference from the employer. The union, moreover, has a statutory obligation to provide representation under section 136.1. [now section 37]. ..."

(page 156; emphasis added)

Recently in Canadian National Railway Company (1994), 94 CLLC 16,061 (CLRB no. 1081), the Board had this to say with regard to the scope of paragraph 94(1)(a):

"...The Code does not specify every obligation or right of employers, employees and their bargaining agents. Section 94(1)(a) is worded in a general, purposive manner, and the Board must apply this general wording to the endless variety of circumstances that may arise."

(page 14,503)

Previous decisions of the Board say that evidence of anti-union animus is not essential to find that there has been a breach of section 94(1)(a) of the Code: Canadian Broadcasting Corporation (1990), 83 di 102; and 91 CLLC 16,007 (CLRBR no. 839); Maritime Employers' Association (1985), 63 di 69; and 12 CLRBR (NS) 18 (CLRBR no. 540); Canadian Pacific Air Lines Limited (1981), 45 di 204; [1982] 1 Can LRBR 3; et 82 CLLC 16,138 (CLRBR no. 334); Canadian Imperial Bank of Commerce, (North Hills and Victoria Hills Branches) (1979), 34 di 651; [1979] 1 Can LRBR 266; and 80 CLLC 16,001 (CLRBR no. 173); Bell Canada (1981), 42 di 298; [1981] 2 Can LRBR 148; et 81 CLLC 16,083 (CLRBR no. 292); Bernshine Mobile Maintenance Ltd. (1984), 56 di 83; 7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRBR no. 465); Ottawa-Carleton Regional Transit Commission (1984), 56 di 203; and 7 CLRBR (NS) 137 (CLRBR no. 475); Canadian Imperial Bank of Commerce (1985), 60 di 19; 10 CLRBR (NS) 182; and 85 CLLC 16,021 (CLRBR no. 499); and Okanagan Helicopters Ltd. (1985), 62 di 21; 10 CLRBR (NS) 385; et 85 CLLC 16,037 (CLRBR no. 521).

In Canadian Broadcasting Corporation, *supra*, the Board, commenting on the effect of this approach, said:

"If there is no evidence of anti-union animus on the part of the employer, the above case law makes it clear that not every difficulty encountered by a union in its formation or administration stems from a violation of section 94(1)(a). Thus, 'apparent interference' by the employer or, to use the Ontario Labour Relations Board's words, 'employer conduct that only incidentally affects a trade union'; (A.A.S. Telecommunications Ltd. and Zipcall Ltd., [1976] OLRB Rep. Dec. 751, page 758) would not constitute the kind of problem contemplated by section 94(1).

'... If that were so, the mere resistance to union demands could be construed as interference. The cases have indicated that where the employer's actions are not tainted by anti-union animus there is a balancing between the interests of employers on the one hand and of unions and employees on the other. ...'

(Bernshine Mobile Maintenance Ltd., supra, pages 91; 29; and 14,312)"

(pages 127-128; and 14,106)

It is appropriate to reiterate, in the instant case, what the Board had to say in Canadian Imperial Bank of Commerce (Toronto) (1979), 34 di 677, and [1979] 1 Can LRBR 391 (CLRB no. 175) with regard to the selection of a trade union by the employees as being part of the formation of a trade union within the meaning of section 94(1)(a):

"... A trade union is an 'organization of employees'. Its existence depends upon the membership in the organization of persons who are employed by an employer. For the purpose of establishing status before the Board as a bargaining agent for a group of employees in a bargaining unit, there must be established that a majority of these employees wish it to represent them. The union usually provides evidence of the position wishes of the majority of the employees in the form of signed membership cards. The Code provides that such evidence if properly presented is indicative of the wishes of the employees and a manifestation of their support. The obtaining of members and the persuasion of other employees to support the union in its bid for certification in case of a representation vote requires effort and organization by the union. They are essential functions which must be performed if the organization is to acquire the status of a bargaining agent under the Code. The formation of a union does not begin and end with the adoption of a constitution, the election of officers, or the acquisition of a charter. It continues, for the purposes of section 184(1)(a) [now 94(1)(a)] of the Code, during the organization of employees who, as its members are essential to its existence. Since the thrust of the Code is the achievement of industrial peace through a scheme of collective bargaining, and that bargaining is to be with respect to bargaining units of employees for which a union is specifically

certified, it would be too narrow a view of the Code to regard the formation of the union as independent from its selection by employees in bargaining units for which it seeks to become bargaining agent. ..."

(pages 699-700; and 408-409)

The purpose of raiding is to displace a certified bargaining agent. The only means to achieve that result is to convince a majority of employees in the bargaining unit to support the raiding union. This activity of persuading employees to become a member of a union during a raid period is essential, and not only incidental to the formation of a trade union.

A raiding campaign necessarily implies the encounter of divergent interests. This is the case here, and the Board must determine the proper balance that must be struck between the competing interests of the two unions, the employees' basic freedom of association and the employer's interests. Such a determination is based essentially on the facts of the case. In this case, the facts are straightforward and uncontested. The Board must determine, based on these facts and on the criteria set out in the jurisprudence, whether or not the employer violated section 94 of the Code.

It is now well established that an employer, faced with a complaint pursuant to section 94(1)(a), can justify its actions or escape the effects of section 94(1)(a) by showing compelling business reasons for doing what it did (see Canada Post Corporation (1987), 69 di 91 (CLRB no. 620); and Ottawa-Carleton Regional Transit Commission (1984), 56 di 203; and 7 CLRBR (NS) 137 (CLRB no. 475). At no time in the instant case did the employer allege operational or business reasons in support of its decision to refuse or to cancel leave.

The employer explained to the Board that it had refused or cancelled leaves because it wished to remain neutral in the raiding campaign, and that to grant leaves would have been perceived as taking sides. It therefore made the decision that is now the subject of this complaint.

At the hearing, the issue of the purpose and consequently, the interpretation of paragraph 27.09 of the collective agreement was raised. According to CUPW, paragraph 27.09 does not contemplate leave without pay for raiding reasons, the argument being that a union would not negotiate a clause in a collective agreement that the employees could ultimately resort to for the purpose of ending the union's status as the certified union. CUPW added that while there may exist an inherent right to participate in a raid, there exists no such right to obtain leave for this purpose under the collective agreement. The employer indicated that it would accept that CUPW's position was both an arguable and a reasonable one.

Thus, the question that remains for the Board to decide is whether, in its desire to remain neutral, the employer made the right decision or whether, in fact, it interfered with a lawful union activity of the employees who wanted to participate in the promotion of LCUC in raiding CUPW.

The meaning of neutrality is at issue here and it must be interpreted in the context of this very particular case. We are in the presence of a certified bargaining agent, and a raiding union that represented until recently almost half of the current bargaining unit. There are also employees who campaign in support of this union and who, given what happened in the past, request the application of a condition of work they consider they are entitled to, in order to participate in a raid.

In Air Canada (1976), 18 di 66; and 77 CLLC 16,062 (CLRB no. 70), the Board stated:

"... Section 184(1)(a) does not require that the employer actively protect the interests of a bargaining agent with which it has a legal relationship against the organizational drives of competing trade unions. The obligation an employer has in this regard is to continue to recognize the incumbent trade union for such time as it continues to enjoy representation rights with respect to the employees in the bargaining unit and to give effect to these rights"

(pages 81; and 323-324)

As the Board said, the employer's behaviour will be determined in light of the legal and contractual relationship it has with a certified union; however, this relationship is not the only factor that must be taken into consideration to determine whether or not the employer's behaviour meets the criterion of neutrality in the context of a raid.

In such a situation and in order to properly balance all the interests at stake, the objectives of the Code, as expressed in the Preamble, remain the main factor. The Code gives the employees the right, at certain times, to try to replace the incumbent union, obviously to promote another union. In such a case, the employer's behaviour must not be perceived as favouring one union over another. In that sense, an employer, in a situation like the present one, does not owe more to the certified bargaining agent than to the employees who want to exercise the right they have under the Code to choose a union to replace the incumbent one.

CPC made its decision to proceed the way it did following CUPW's protests that the employer's behaviour breached its obligation to remain neutral during an organizing campaign. The Board has no doubt that the employer made its decision in a perspective of neutrality, but the fact is that its decision was a departure from the interpretation and application of the collective agreement during the previous raiding campaign in 1991 and in 1994, before CUPW's interventions.

For the Board, the key element here is the fact that the employer had granted such leave without pay during the previous raiding campaign. It is not for the Board to determine if this application and interpretation of the collective agreement was right or wrong. It is for the arbitrator to interpret the collective agreement and for the parties, during the bargaining process, to decide what conditions of work should be included in the collective agreement. The fact remains that leaves without pay were previously granted, and for this reason, the Board considers that the employer's change in the interpretation and the application of the collective agreement in the

context and the circumstances of this case interferes with the formation of a trade union, insofar as LCUC's supporters were denied leave without pay that had in the past, been granted pursuant to the collective agreement for the same reasons. The employer's decision in fact deprives the employees who have chosen to support LCUC of one of the contractual mechanisms previously used with respect to their freedom of association.

This decision turns on the fact of the employer's departure from an established interpretation and application of existing collective agreement wording and accordingly, is narrow in its scope. By choosing to depart from this interpretation and application of the collective agreement, uncontested until now, the employer breached its obligation to remain neutral, interfered with the formation of a trade union and thus violated section 94(1)(a) of the Code.

III

LCUC also submits that CPC has violated section 94(3)(a)(i) of the Code. Having heard the parties and reviewed all the material on file, the Board finds that the employer's behaviour was not tainted with anti-union animus. Faced with a conflict that needed to be resolved, the employer made the decision that it felt was appropriate, the legality of which was later contested. However, there is nothing to indicate that CPC intended to deprive the supporters of LCUC of the freedom to exercise their right to associate. The employer explained the context and the basis of its decision and the Board is satisfied that there was no violation of section 94(3)(a)(i) of the Code.

IV

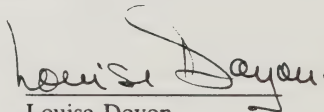
For these reasons, and having regard to the overall circumstances of the case and the objectives of the Code, the Board finds that CPC's decision to refuse to grant or to cancel leaves without pay contrary to the interpretation and application of the

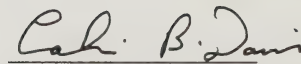
collective agreement that existed until Canada Post changed its position in July 1994, constitutes illegal interference in the formation of a trade union.

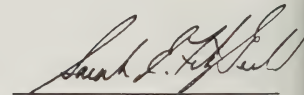
Consequently, the Board:

1. DECLARES that CPC violated section 94(a)(1) of the Code in refusing to grant or in cancelling leave without pay to employees known or identified in the 1995 raiding campaign as LCUC's supporters, and
2. ORDERS CPC to grant, according to the interpretation and application of the collective agreement that existed until July of 1994, requests for leave without pay to employees who wish to promote and advance LCUC's interests in the 1995 raiding campaign.

The Board retains jurisdiction to deal with any question arising in connection with the implementation of this decision, including the making of a specific Order if the need arises. The Board further designates Pierre Lajeunesse, Senior Labour Relations Officer of the Ottawa office to assist the parties, if requested by any one of them in the implementation of this decision.


Louise Doyon
Vice-Chair


Calvin B. Davis
Member


Sarah E. FitzGerald
Member

information

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Summary

A. Patrick Gilmore, *applicant*, and Canadian National Railway Company, *respondent*.

Board Files: 950-276 and 950-285
CLRB/CCRT Decision no. 1096
December 19, 1994

These reasons deal with a referral of a safety officer's decision to the Board pursuant to section 129(5) and a complaint filed pursuant to section 133 of Part II of the Canada Labour Code.

The applicant working as a yardmaster for the Canadian National Railway Company exercised his right to refuse to work because of the inadequacies in the system of radio communication which is being used by the applicant and all employees involved in the yard operations for the control of train movements. The safety officer assigned to investigate the refusal concluded that there was no danger within the meaning of the Code. Following the safety officer's decision, the applicant maintained his refusal to work. It is this refusal that allegedly led the employer to take disciplinary action against the applicant.

Résumé

A. Patrick Gilmore, *requérant*, et Compagnie des chemins de fer nationaux du Canada, *intimée*.

Dossiers du Conseil: 950-276 et 950-285
CLRB/CCRT Décision n° 1096
le 19 décembre 1994

Les présents motifs portent sur un renvoi au Conseil d'une décision d'un agent de sécurité aux termes du paragraphe 129(5) et sur une plainte déposée en vertu de l'article 133 de la Partie II du Code canadien du travail.

Le requérant qui travaille comme chef de gare de triage pour la Compagnie des chemins de fer nationaux du Canada a exercé son droit de refuser de travailler en raison des lacunes du système de communication par radio qu'utilisent le requérant et tous les employés affectés aux activités de la gare de triage liées au contrôle des mouvements des trains. L'agent de sécurité chargé de faire enquête sur le refus a conclu qu'il n'y avait pas de danger au sens du Code. À la suite de la décision de l'agent de sécurité, le requérant a maintenu son refus de travailler. C'est ce refus qui a donné lieu, selon le requérant, aux mesures disciplinaires imposées par l'employeur au requérant.



The Board concluded that the situation complained about was not one of danger. Even if inadequacies of the radio communication system could increase the risks of potentially dangerous situations, there are well-known rules in place, such as the "blue flag" rules, which are designed to govern train movements and ensure safe operations. The decision of the safety officer is confirmed and the referral application is dismissed.

The Board also concluded that the employer's disciplinary actions were not taken in violation of section 147(a)(iii). First, the applicant had not acted in accordance with Part II of the Code since he did not have any reasonable cause to believe that a dangerous condition existed. Furthermore, the Board was convinced that the employer's disciplinary action was motivated by the applicant's behaviour which the employer reasonably perceived to be insubordinate. The complaint of violation of section 147(a) is dismissed.

Le Conseil a conclu que les conditions qui faisaient l'objet de la plainte n'étaient pas dangereuses. Même si les lacunes du système de communication par radio pouvaient augmenter les risques de conditions dangereuses, il existe des règles bien établies soit celles du «drapeau bleu», conçues pour contrôler les mouvements des trains et pour assurer la sécurité. La décision de l'agent de sécurité est confirmée, et la demande de renvoi est rejetée.

Le Conseil a également conclu que les mesures disciplinaires imposées par l'employeur n'enfreignaient pas le sous-alinéa 147a)(iii). D'abord, le requérant n'a pas agi en conformité avec la Partie II du Code puisqu'il n'avait aucun motif raisonnable de croire que des conditions dangereuses existaient. En outre, le Conseil est convaincu que l'employeur a imposé des mesures disciplinaires au requérant en raison d'un comportement qu'il considérait à juste titre comme de l'insubordination. La plainte alléguant violation de l'alinéa 147a) est rejetée.

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Reasons for decision

A. Patrick Gilmore,

complainant,

and

Canadian National Railway Company,

respondent.

Board Files: 950-276 & 950-285

CLRB/CCRT Decision no. 1096

December 19, 1994

The Board was composed of Mr. J.F.W. Weatherill, Chairman. Hearings were held on April 8, 1994 (950-276) and on July 11, August 24, 25 and 26 and November 14 and 16, 1994 (950-285), in Montréal.

Appearances

Messrs. Robert Michaud and Patrick Gilmore, for the applicant;

Messrs. Raynald Lecavalier and John Pasteris, for the respondent; and

Mr. Denis Lupien (April 8, 1994).

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

There are two applications before the Board, the first (file 950-276) being the reference to the Board, pursuant to section 129(5) of the Canada Labour Code, of the decision of a safety officer that there was no danger within the meaning of the Code in the circumstances to be described; the second (file 950-285) being a complaint filed pursuant to section 133 of the Code alleging that the respondent employer has taken action against the complainant in contravention of section 147(a) of the Code.

A hearing was held in the matter of the reference of the safety officer's decision (950-276), but before a decision in that matter was made, the complaint (950-285) was

filed, and it became apparent that the decision on the reference would be an academic matter except in relation to the decision with respect to the complaint. Hearings were then held with respect to the complaint, and the parties were advised that, although the files were not consolidated, and raise distinct questions, they are nevertheless related, and would be decided at the same time, with as little delay as possible. The parties raised no objection to this procedure.

I

The fundamental issue in this matter involves working conditions at Turcot Yard, in Montréal, where the complainant works as a yardmaster on the night shift. Turcot is a switching yard; trains are brought in and out of the yard by road crews, but other movements within the yard are carried out by yard crews, and certain train inspections are carried out by carmen working in the yard itself. Turcot adjoins an intermodal yard, and there are many train movements in the course of the shift. The yardmaster, under the direction of a supervisor, coordinates and authorizes these movements. For the yard to operate safely and efficiently, it is clear that there must be good communication between the persons requiring movements to be made (to assemble trains, to switch cars, to carry out inspections), those making the movements (train crews), those working on or inspecting trains within the yard (carmen) and the person authorizing and controlling movements (the yardmaster).

The days of mechanical and hand signals for the control of yard movements are largely, although not entirely over, and the principal method of communication currently relied on is radio. There is no single system of radio communication in effect, the needs of the various groups being different. Equipment is not uniform, and different frequencies are used. Effective and efficient communication with respect to yard movements, then, is a difficult task, and there is no doubt that yardmasters and others are justified in believing that there is considerable potential for dangerous situations to arise.

There are, however, rules - developed and modified over many years, and authorized by the National Transportation Agency - governing all train movements as well as the performance of work in yards. Where reliable communication by radio does not take place, compliance with the rules governing train movement, while no doubt slowing down yard activity, assures the safety of operations. Even where radio communication is effective, compliance with the rules - particular mention may be made of the "blue flag" rules protecting persons working on cars within a yard - must be maintained.

On February 19, 1994, when Mr. Gilmore considered that a dangerous condition existed, and when the safety officer, Mr. Lupien, made his investigation, it can properly be said to have been the case that there were problems and inadequacies in the system or systems of radio communication on which Mr. Gilmore, and all those involved in yard operations, had to rely to carry out their work. That the "chaos" which Mr. Gilmore felt existed was a rather exaggerated view of the situation would appear from the operation - how efficiently is not known - of the yard on other shifts, and on the night shift under other yardmasters. The safety officer, Mr. Lupien, investigated the situation and concluded that there was no danger within the meaning of the material provisions of the Canada Labour Code.

Section 128.(1) of the Code provides as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or thing or to work in that place."

Mr. Lupien made his investigation of the situation pursuant to section 129(1) of the Code, and his conclusion was that there was no danger. The concluding portions of his report are as follows:

"With respect to the hazards associated with the allegations that were raised and the facts noted, this decision is based on all of the following factors.

Whereas:

- At the time of the refusal none of the situations described suggest that trains were moving in the yard without clearance from the yardmaster;

- Whereas the safety of movements, after receiving clearance from the yardmaster, does not depend on the latter but on other procedures and equipment;

- Without that communication no one moved off the tracks specified by the controllers;

- A complete breakdown of the tower's communication system would not compromise the safety of movements, since it is not a condition for them;

- Radio communication is not the means of ensuring the safety of employees and movements in the yard;

I rule that there was no danger to the safety and health of the employees covered by this decision with respect to the considerations mentioned above."

In the Board's view, the safety officer's decision was correct. While the inadequacies of the radio communications system or systems would surely decrease the efficiency of yard operations, and while it could well be argued that such inadequacies increased somewhat the risks of potentially dangerous situations arising, it remains that all train movements and other yard activities were governed by rules designed to ensure safe operations. There is nothing to suggest that employees were not aware of these rules, or that they were not appropriately enforced. The situation, the Board concludes, was not one of "danger" within the meaning of the Code.

II

Mr. Gilmore again refused to carry out his duties as yardmaster on February 25, 1994, also, on the ground of alleged reasonable cause to believe that a dangerous situation existed. Although it has now been determined, as set out above, that there was no danger within the meaning of the Code in the situation in issue, the question whether or not there was "reasonable cause" to believe that a dangerous condition existed is a distinct one. In my view, for the reasons set out above, Mr. Gilmore did not have reasonable cause to believe that a dangerous situation existed, much as he may have been justified in believing that the system or systems of radio communications were inadequate for efficient operations. As the Board stated in David R. Holloway, (1990), 83 di 50; and 14 CLRBR (2d) 293 (CLRB no.835), it is not unreasonable to be wrong, and employees ought not to be discouraged from raising suspicions or fears about danger in the work place. In the instant case, however, the Board finds not only that Mr. Gilmore was wrong in his belief that there was a danger in the circumstances, but that his belief, however genuine, in the existence of such danger, was one for which there was no reasonable cause.

The foregoing would be, in itself, sufficient grounds to dismiss the complaint of violation of section 147(a) of the Code. The material provisions of that section are as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee ... or take any disciplinary action against or threaten to take any such action against an employee because that employee;

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

In the instant case, the employer has taken disciplinary action against the complainant, allegedly in violation of section 147(a)(iii). The "action in accordance with this Part" of the Code was, in the circumstances, the refusal to work on the grounds of perceived danger. As we have seen, there was no reasonable cause for belief that a danger existed; there was thus no action taken by the complainant "in accordance with this Part" of the Code.

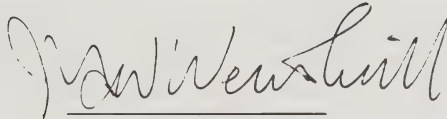
In any event, where a complaint of alleged violation of section 147 is brought, as it may be, pursuant to section 133 of the Code, the complaint itself is, by virtue of section 133(6), evidence that that contravention actually occurred, and where the respondent alleges, as the respondent here does, that the offence did not occur, the burden of proof is on the respondent. In the instant case, the respondent has met the burden of proof. The evidence establishes that the motivation for the disciplinary action taken against the complainant was the employer's genuine belief that the complainant refused to carry out his duties without reasonable cause to do so, and in particular without reasonable cause to believe that there was a danger within the meaning of the Code which would justify his refusal to perform his duties, and that, as well, the complainant had behaved in an insubordinate manner toward his supervisor.

While considerable evidence was heard with respect to the latter point, it is not necessary to make any determination on the substantive question whether or not there was insubordination, or on the question whether or not, having regard to all material considerations including the complainant's disciplinary record, there was just cause for the penalty imposed. Those are questions which might be raised in the course of a grievance procedure, or in any arbitration proceedings which might ensue. It is sufficient for the Board's purposes to note that the burden of proof, which in these circumstances is on the employer, has been met and that it has been established that the disciplinary action taken against the complainant was not taken because he had acted in accordance with Part II of the Code. As has been found, (1) the complainant did not act in accordance with Part II of the Code; and (2) the disciplinary action was

based not merely on the refusal to work at the times in question, but on the insubordinate behaviour - or more precisely, since this Board does not determine that question - on the behaviour which the employer reasonably perceived to be insubordinate on the part of the complainant. Whatever may be said by the appropriate tribunal on the "just cause" issue, then, it is the conclusion of this Board that there was no violation of section 147(a) of the Canada Labour Code.

III

For all of the foregoing reasons, (1) the decision of the safety officer is confirmed; and (2) the complaint of violation of section 147(a) is dismissed.

A handwritten signature in dark ink, appearing to read 'J.F.W. Weatherill', written in a cursive style. The signature is positioned above a horizontal line.

J.F.W. Weatherill
Chairman

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Summary

International Brotherhood of Electrical Workers, Local Union 339, *applicant*, and The Corporation of the City of Thunder Bay, Telephone Division (operating as Thunder Bay Telephone), *employer*.

Board Files: 555-3760 and 555-3761
CLRB/CCRT Decision no. 1097
December 16, 1994

Résumé

Fraternité internationale des ouvriers en électricité, section locale 339, *requérante*, et The Corporation of the City of Thunder Bay, Telephone Division (exploitée sous la raison sociale Thunder Bay Telephone), *employeur*.

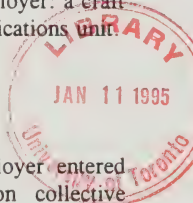
Dossiers du Conseil: 555-3760 et 555-3761
CLRB/CCRT Décision n° 1097
le 16 décembre 1994

The applicant filed two applications to be certified as the bargaining agent for two groups of employees of the employer: a craft unit, and an office and communications unit.

La requérante a présenté deux demandes en vue d'être accréditée à titre d'agent négociateur de deux groupes d'employés de l'employeur: une unité composée des employés de métier et une unité comprenant les employés de bureau et les employés préposés aux communications.

On January 1, 1992, the employer entered into two voluntary recognition collective agreements for the above units which were to expire on December 21, 1993. While the agreements were in force, the Ontario Legislature passed the Social Contract Act, 1993 which came into force on June 14, 1993. The legislation, among other things, allowed the bargaining agent to extend the life of the collective agreements by virtue of a simple notice. At the relevant times, the parties deemed themselves to be governed by the Act and on November 15, 1993, the applicant sent the employer notices to extend the two collective agreements to March 31, 1996.

Le 1^{er} janvier 1992, l'employeur a conclu deux conventions collectives de reconnaissance volontaire visant les deux unités susmentionnées; ces deux conventions devaient prendre fin le 21 décembre 1993. Au cours de la période d'application de ces conventions, le législateur de l'Ontario a adopté la Loi de 1993 sur le contrat social, qui est entrée en vigueur le 14 juin 1993. La loi, entre autres choses, permettait à l'agent négociateur de prolonger la durée des conventions collectives par la simple signification d'un avis. À la période pertinente de l'affaire, les parties se considéraient assujetties à la loi et, le 15 novembre 1993, la requérante a signifié des avis à l'employeur afin de prolonger la durée des conventions collectives jusqu'au 31 mars 1996.



On April 26, 1994, the Supreme Court of Canada decided that Téléphone Guèvremont, a local telephone company in Quebec whose operation mirrored that of Thunder Bay Telephone, fell within the legislative authority of the Parliament of Canada. Following that Supreme Court ruling the applicant filed the present applications for certification.

The Board found that the employer falls within federal jurisdiction. However, the Board's jurisdictional determination does not have a retroactive effect on the actions taken by the parties. Actions taken by the parties, pursuant to provincial legislation, are valid and binding on them even after it is determined that the employer's labour relations fall within federal jurisdiction.

The Board found that the collective agreements in question, therefore, were extended by virtue of:

1. the conduct of the parties constituting voluntary recognition; and
2. the union's valid notices, given pursuant to section 35 of the Social Contract Act, 1993.

Accordingly, the collective agreements remain in force until March 31, 1996.

Having so determined, the applications for certification were untimely pursuant to section 24(2)(c) of the Code.

Le 26 avril 1994, la Cour suprême du Canada a jugé que Téléphone Guèvremont, compagnie de téléphone locale au Québec, l'exploitation ressemble à celle de Thunder Bay Telephone, relevait de la compétence législative du Parlement du Canada. Par la suite, du jugement de la Cour suprême, requérante a présenté ses demandes d'accréditation.

Le Conseil a conclu que l'employeur, dans l'espèce, relevait de la compétence fédérale. Cependant, la décision du Conseil concernant sa compétence n'a aucun effet rétroactif sur les gestes posés par les parties. Aux termes de la loi provinciale, les gestes posés par les parties sont valides et lient les parties même s'il a été décidé que les relations du travail de l'employeur relèvent de la compétence fédérale.

Le Conseil a conclu que la durée des conventions collectives en question était prolongée en raison:

1. du comportement des parties qui constitue une reconnaissance volontaire, et
2. des avis valides du syndicat signifiés aux termes de la Loi de 1993 sur le contrat social.

Par conséquent, les conventions collectives restent en vigueur jusqu'au 31 mars 1996.

Étant donné cette conclusion, les demandes d'accréditation ne sont pas recevables aux termes de l'alinéa 24(2)c) du Code.

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Reasons for decision

International Brotherhood of Electrical Workers,
Local Union 339,

applicant,

and

The Corporation of the City of Thunder Bay /
Telephone Division

employer.

Board Files: 555-3760 and 555-3761
CLRB/CCRT Decision no. 1097
December 16, 1994.

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Calvin B. Davis and Ms. Sarah E. FitzGerald, Members.

Appearances (on record)

Mr. Jim Leishman, for the applicant; and

Mr. Alan Hjorth and Ms. Sharon Hacio, for the employer.

The reasons for this decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

On May 25, 1994, the International Brotherhood of Electrical Workers, Local Union 339 ("IBEW" or the "Union") filed two applications to be certified as the bargaining agent for the following two groups of employees working at Thunder Bay Telephone:

- Craft Unit; (Board file: 555-3760); and,
- Office and Communications Unit; (Board file: 555-3761).

II

Thunder Bay Telephone, a division of the Corporation of the City of Thunder Bay, (the "Employer"), operates a telephone company in Thunder Bay, Ontario.

On January 1, 1992, the IBEW and the Employer entered into two voluntary recognition collective agreements for the Craft and the Office and Communications units covered by this application. Both agreements were to expire on December 31, 1993.

While these agreements were still in force, the Ontario Legislature passed the Social Contract Act, 1993, S.O. 1993, c. 5 (which came into force on June 14, 1993). That Act, among other things, allows a bargaining agent to extend the life of a collective agreement by serving a simple notice to that effect on the employer. Section 35 of the Social Contract Act, 1993 reads as follows:

"35. (1) A bargaining agent may, by written notice to the employer of employees to whom this Part applies, require that a collective agreement be extended to March 31, 1996 if the agreement was or is governed by an Act that permits the employees to strike.

(2) The notice may be given before or after the collective agreement expires.

(3) The giving of the notice extends an existing collective agreement or, in the case of a collective agreement that has expired, revives and extends the expired agreement to March 31, 1996."

At the relevant time, both parties considered their labour relations to be governed by the above legislation. Accordingly, on November 15, 1993, the IBEW sent the Employer two similar notices (one for the Craft unit and one for the Office and Communications unit) to extend the two collective agreements until March 31, 1996.

The notices contained the following clauses:

"Please accept this as notice to extend the Collective Agreement for the bargaining unit of Craft Workers, Thunder Bay Telephone."

"Please accept this as notice to extend the Collective Agreement for the bargaining unit of Office and Communications Workers, Thunder Bay Telephone."

Although the Employer's consent to this extension was not required under section 35 of the Act, supra, it nevertheless agreed to the union's request, in two separate but similar letters dated December 20, 1993, in the following terms:

"The Corporation agrees to extend the collective agreement for the bargaining unit Craft Workers, Thunder Bay Telephone."

"The Corporation agrees to extend the collective agreement for the bargaining unit of Office and Communications Workers, Thunder Bay Telephone."

Four months later, on April 26, 1994, the Supreme Court of Canada decided that Téléphone Guèvremont, a local telephone company in Quebec whose operation mirrored that of Thunder Bay Telephone, fell within the legislative authority of the Parliament of Canada by reason of the nature of the services it provides to its clients; Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications), [1994] 1 S.C.R. 878.

Following that ruling, the IBEW filed the present applications for certification.

III

At the outset, we find, on the basis of Téléphone Guèvremont Inc., *supra*, that the nature of the operations of Thunder Bay Telephone falls within federal jurisdiction, and the Board is constitutionally empowered to deal with the present applications for certification. However, our jurisdiction to entertain the two applications is at issue with respect to timeliness, under section 24(2)(c) of the Code. Section 24(2)(c) restricts the authority of the Board to deal with an application for certification where a collective agreement applicable to the unit is in force :

"24. (2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this part as the bargaining agent for the unit, at any time;

(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;

(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and

(d) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only

(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and

(ii) after the commencement of the last three months of its operation."

(emphasis added).

The issue of whether the collective agreements are in force for the purposes of the above section may be answered by considering the following questions:

(1) Notwithstanding the applicability or non-applicability of the Social Contract Act, 1993, have the parties, by their conduct, extended the voluntary recognition collective agreements entered into on January 1, 1992?

(2) Alternatively, are the notices the union transmitted to the employer, pursuant to the provincial legislation, nevertheless valid and do they extend the collective agreements notwithstanding that Thunder Bay Telephone falls within federal jurisdiction by virtue of the judgement of the Supreme Court of Canada in Téléphone Guèvremont Inc., supra?

In other words, was the Social Contract Act, 1993 applicable to Thunder Bay Telephone at the time the union sent its notices or does the Board's ruling that Thunder Bay Telephone falls under federal jurisdiction have a retroactive effect with the result that the Social Contract Act, 1993 is deemed never to have applied to Thunder Bay Telephone?

IV

(1) Voluntary Recognition Agreements

In our view, the parties have, by their conduct, entered into valid voluntary recognition agreements within the meaning of section 3 of the Code. The union sent notices to the employer requiring that the collective agreements be extended to March 31, 1996. Although not a prerequisite to the extension of collective agreements pursuant to the Social Contract Act, 1993, the employer, in its responses to the union's notices, nevertheless consented to extend the collective agreements. These responses were not simple acknowledgments of the unions' notices; they were explicit agreements to the extensions.

The circumstances here are similar to those where parties enter into a collective agreement, pursuant to a provincial certification, at a time when they believe they are subject to the provincial labour laws, but later find they are governed by federal legislation. In such cases, the Board has found that an agreement entered into by the parties under the provincial regime constituted a valid voluntary recognition collective agreement under the Canada Labour Code, even though the parties were forced to negotiate it because of the provincial certification: (Cable T.V. Limitée (1979), 35 di 28; [1980] 2 Can LRBR 381; and 80 CLLC 16,019 (CLRBR no. 188); Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRBR no. 501); Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRBR no. 574) and affirmed in Brewster Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRBR no. 580); and Bill White et al. (1993), 92 di 18 (CLRBR no. 1011)).

By agreeing to extend the collective agreements, the parties in this case entered into valid voluntary recognition agreements under the Code. Insofar as those collective agreements consequently remain in force, the certification applications are therefore untimely pursuant to section 24(2)(c).

Although this conclusion might itself dispose of the present matter, the second question merits equal examination.

(2) Applicability of the Social Contract Act, 1993

In order to determine the effect of the transfer of Thunder Bay Telephone from provincial to federal jurisdiction on the applicability of the Social Contract Act, 1993 at the time the union sent its notices to the employer, we must first establish whether the constitutional categorization of an undertaking involves an issue of constitutional validity or one of constitutional applicability.

There is a clear distinction between constitutional validity and constitutional applicability. The former relates to the ability of a legislature to enact a statute within its jurisdiction and in conformity with the Canadian Charter of Rights and Freedoms, whereas the latter relates to the applicability of a valid statute to a particular situation - in this case, to a particular undertaking: See Commission de transport de la Communauté urbaine de Québec, v. Canada (National Battlefields Commission), [1990] 2 S.C.R. 838, at page 851; and Bell Canada v. Québec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749, at pages 816-817.

Labour relations jurisdictional disputes have nothing to do with **constitutional validity**; they relate rather to the concept of **constitutional applicability**. The constitutional debate surrounding the jurisdictional status of a particular undertaking is mainly a question of fact: one of **applicability** of the Canada Labour Code. Constitutional applicability relies on findings of fact, namely constitutional facts, which may change over time (e.g., a transportation business may transform its operations from intraprovincial to interprovincial or vice versa). Tribunals will require evidence of such facts to support a change in jurisdictional status. If the evidence is insufficient to reverse the presumption that labour relations matters fall within provincial jurisdiction, the tribunal will conclude that the undertaking is provincial; see: Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754, at p. 775.

Where a tribunal decides that a law is unconstitutional, the issue is one of constitutional validity and the statute is nullified *ab initio*, i.e. any measures taken thereunder would be null and void from the outset. Professor Peter W. Hogg describes this situation as follows:

"A judicial decision that a law is unconstitutional is retroactive in the sense that it involves the nullification of the law from the outset. Indeed, any judicial decision must be retroactive in order to apply to the facts before the court, since those facts must have already occurred. That a

court makes new law when it overrules prior doctrine or even when it decides an unprecedented case is not open to doubt; but a court does not make new law in the same way as a legislative body, that is, for the future only."

(Hogg, P.W. Constitutional Law in Canada, 3rd ed., Vol. 2, Scarborough, Carswell, 1992, pages 55-1, 55-2)

On the other hand, in contrast to a determination that legislation is constitutionally invalid, where a tribunal determines that a statute is constitutionally valid but not applicable to a particular situation, person or undertaking, every prior action taken pursuant to that statute, nonetheless has legal force and effect.

A tribunal's declaration of constitutional applicability is akin to the enactment or repeal of legislation. In both cases, actions taken before the enactment or the repeal of the legislation remain valid and produce legal consequences even if the new legislation or the repeal has the effect of changing the applicable law with respect to them.

Professor P.A. Côté explains the general principle of non-retroactivity for newly-adopted statutes as follows:

"In Canadian law, the general principle of non-retroactivity is not the subject of a general enactment. As a fundamental principle derived from European jus commune, a legislative provision would have been superfluous. Retroactive operation must be the exception rather than the rule. The need for predictability in the legal system is incompatible with the application of provisions to events that precede their enactment. 'We can't ask men to be, prior to the law, what they must only become by reason of it.'"

(Côté, P.A., The Interpretation of Legislation in Canada, 2nd. ed. (Cowansville: Les Editions Yvon Blais, 1991), page 115)

V

In accordance with the principles set forth above, the Social Contract Act, 1993 no longer applies to the employees of Thunder Bay Telephone as of the date of this Board's determination that the employer's activities fall within federal jurisdiction. Nevertheless, the Union's notices to the Employer of November 15, 1993 - sent pursuant to section 35 of that legislation and transmitted at a time when the provincial legislation was constitutionally applicable to the parties - have legal force and effect inter se. Accordingly, the extension of the collective agreements achieved pursuant to the notices are valid and effective from the perspective of labour relations regulation.

The Board's jurisprudence in Cable T.V. Limitée, supra; Emde Trucking Ltd., supra; Brewster Transport Company Limited, supra; and Bill White, supra, achieves a similar result. Collective agreements which the parties were forced to negotiate consequent upon the issuance of a provincial certification order were deemed to be **valid** voluntary recognition agreements under the Code even though the business was subsequently found to fall within federal jurisdiction.

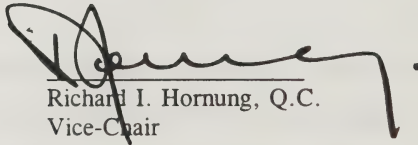
Similarly, actions taken by the parties, pursuant to provincial legislation, are valid and binding on them even after it is determined that the employer's labour relations activities fall within federal jurisdiction.

This conclusion makes the most sense from a labour relations perspective. An undertaking is subject to change from provincial to federal jurisdiction (and vice versa) a number of times during its lifetime depending on the constitutional facts which are evidenced by its day to day operation. It would make no labour relations sense if the actions of the parties involved in that undertaking, (collective agreement, grievances, etc.), taken pursuant to the jurisdiction which applied at a given time, were declared null and void and became of no legal effect each time there was a transfer of jurisdiction. Such an interpretation would compel the parties to repeatedly return to their pre-agreement status. This would not only create an operational and


jurisdictional hiatus, but would also result in labour relations instability and impede industrial peace.

For these reasons, our ruling that Thunder Bay Telephone falls within federal jurisdiction does not have a retroactive effect on the actions taken by parties in the instant case. The union's valid notices, given pursuant to section 35 of the Social Contract Act, 1993, effectively extended the collective agreements in question. Accordingly, the agreements were in force and effect at the date of the present certification applications and remain so until March 31, 1996.

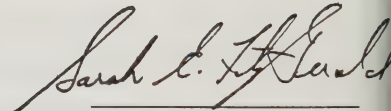
Consequently, the Board concludes that even if it had answered no to the first issue, the certification applications would nevertheless be untimely under section 24(2)(c) of the Code because of the union's notices, properly transmitted to the employer, pursuant to the Social Contract Act, 1993.



Richard I. Hornung, Q.C.
Vice-Chair



Calvin B. Davis
Member



Sarah E. FitzGerald
Member

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Summary

Ross Mikalson, *complainant*, Canadian Union of Postal Workers, *respondent*, and Canada Post Corporation, *employer*.

Board File: 745-4614
CLRB/CCRT Decision no. 1098
December 19, 1994

The complainant, an employee of Canada Post Corporation, was given a five-day suspension without pay. He went to the union's office with his union steward, filled out the required complaint form, and discussed the matter with the grievance officer. According to the complainant, the subsequent failure of the Canadian Union of Postal Workers to file his complaint as a grievance within the collective agreement time limits is a breach of the duty of fair representation in section 37 of the Code. He claims that the grievance processing system used by the union is inadequate, and the cause for late filing of his grievance.

The union's local grievance officer did not recall meeting with the complainant to discuss the suspension grievance. He had found the grievance form in the employee grievance collection box at a date already beyond the time limits for filing the grievance.

A union executive member testified that the local's grievance officer revealed that he had confused two employee names and misfiled the grievance form, only to find it after the time limits for filing the grievance had passed.

Résumé

Ross Mikalson, *plaignant*, Syndicat des postiers du Canada, *intimé*, et Société canadienne des postes, *employeur*.

Dossier du Conseil: 745-4614
CLRB/CCRT Décision n° 1098
le 19 décembre 1994

Le plaignant, un employé de la Société canadienne des postes, a reçu une suspension de cinq jours sans rémunération. Il est allé au bureau du syndicat, accompagné de son délégué syndical, a rempli la formule de grief requise et a discuté de la situation avec l'agent des griefs. Selon le plaignant, le fait que le Syndicat des postiers du Canada n'a pas par la suite déposé de grief dans les délais prescrits par la convention collective constitue un manquement au devoir de représentation juste prévu à l'article 37 du Code. Il prétend que le système de traitement des griefs utilisé par le syndicat est inadéquat, ce qui explique le retard de son grief.

L'agent de griefs de la section locale ne se souvient pas d'avoir rencontré le plaignant pour discuter du grief concernant une suspension. Il a trouvé la formule de grief dans la boîte réservée aux griefs des employés à une date bien après le délai prévu pour le dépôt d'un grief.

Selon le témoignage d'un dirigeant syndical, l'agent de griefs de la section locale a confondu le nom de deux employés et a mal classé la formule de grief, puis a découvert le grief une fois le délai passé.

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The Board found that the complainant did visit the union office and provide the union with his grievance form in a timely manner. Despite the grievance officer's recollection of events, the Board was satisfied that the grievance officer had indeed misfiled or misplaced the grievance form, because of a confusion in employee names. The Board found that this was an innocent error amounting to simple negligence only.

Although the union's system for processing grievances was not sophisticated, the Board found the late filing was not tied to the system. Instead, the nature of the grievance officer's error meant that the grievance did not reach the grievance processing system. The Board would not view well the union's unexplained failure to ensure that a grievance form reached the collection box for employee grievances. However, the Board was satisfied on the evidence in this case that simple negligence had occurred, not tied to an inexcusable error in the grievance processing system. The Board dismissed the complaint.

Le Conseil juge que le plaignant s'est rendu au bureau du syndicat et a déposé la formule de grief dans les délais prescrits. Malgré la version des faits de l'agent de griefs, le Conseil est convaincu que l'agent a en fait mal classé ou égaré la formule de grief pour raison de la confusion reliée au nom des employés. Le Conseil juge qu'il s'agit d'une légère erreur qui n'équivaut qu'à de la simple négligence.

Bien que le système de traitement des griefs du syndicat ne soit pas très perfectionné, le Conseil conclut que le retard du dépôt n'est pas relié au système. C'est plutôt la nature de l'erreur de l'agent de griefs qui explique que le grief n'a pas suivi le cheminement. Le Conseil ne verrait pas d'un bon oeil le manque de soin et le manque d'attention à s'assurer qu'une formule de grief aboutisse dans la boîte réservée aux griefs des employés. Cependant, le Conseil est convaincu que, en se fondant sur la preuve, il y a eu simple négligence en l'espèce, et non une erreur impardonnable reliée au système de traitement des griefs. Le Conseil rejette la plainte.

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Reasons for decision

Ross Mikalson,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: **745-4614**

CLRB/CCRT Decision no. **1098**

December 19, 1994

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chairman, and Mr. Patrick H. Shafer and Ms. Sarah E. FitzGerald, Members. A hearing was held in Calgary, Alberta, on May 17 and 18, 1994.

Appearances

Mr. Ross Mikalson, on his own behalf;

Ms. Catherine R. McCreary, counsel, accompanied by Mr. Ken White, for Canadian Union of Postal Workers; and

Mr. Sean M. Kennedy, counsel, for Canada Post Corporation.

These reasons for decision were written by Ms. Sarah E. FitzGerald, Member.

I

Mr. Ross Mikalson, complainant, says that the Calgary local of the Canadian Union of Postal Workers (CUPW) violated the duty of fair representation set out in section 37 of the Code. He says CUPW failed to grieve his 5-day suspension without pay within the 25-day time limit set out in the collective agreement.

In December 1990, Mr. Mikalson was sorting mail on the midnight shift at the Calgary Mail Processing Plant. He says that ongoing problems associated with leg injuries did not permit him to work more than the 6-hour shift of light duties recommended by his doctor. Canada Post believed he could work an 8-hour shift. By letter dated December 4, 1990 Canada Post imposed the suspension.

The complainant says that on December 6, he filed a written complaint about the suspension with CUPW but that CUPW did not file a grievance within the specified time limits. Mr. White, second vice-president of the CUPW local and its grievance officer, maintains that he did not receive the written complaint on December 6, 1990. Mr. White says he first discovered the complaint tucked inside documents that Mr. Mikalson provided to CUPW later, under cover letter of January 28, 1991. At this stage the time limits for filing the grievance had already passed. Mr. White says he filed the grievance anyway, knowing timeliness was in issue, but hoping the employer would excuse the late filing.

Canada Post declared the grievance untimely at each step of the grievance procedure. Eventually, the national office of CUPW decided to drop the grievance. Mr. Mikalson learned of this decision on June 24, 1993. He filed his section 37 complaint with the Board on September 21, 1993.

There was some suggestion that Mr. Mikalson's complaint to the Board was filed outside of the 90-day time limit under section 97(2) of the Code. Mr. White says he

telephoned Mr. Mikalson on February of 1992, to advise that the complaint was untimely. However, Mr. White also says that he advised Mr. Mikalson that he would file a grievance anyway, which he did. Mr. Mikalson did not learn of CUPW's decision to drop that grievance until June 23, 1993. The complaint to the Board is timely.

II

In his section 37 complaint, Mr. Mikalson complains specifically of the "archaic" grievance filing system used by Mr. White. He says use of a manual system of labelled boxes and coloured file folders to collect and store employee grievances provides no means to prioritize grievances or to develop an independent critical path. He says Mr. White has access to but does not properly use CUPW's computerized data filing and retrieval system. As Mr. White's manual system cannot ensure the timely processing of grievances, then late filings arising from otherwise honest mistakes or unintentional errors are no excuse.

III

There are two issues to consider. First, the preliminary issue of whether Mr. Mikalson provided his complaint to the union in a timely manner. If so, then secondly, does the union's failure to file a grievance within the required time frame constitute a violation of the duty of fair representation?

On the preliminary issue, the Board heard conflicting evidence. Mr. Mikalson's evidence about filing his written complaint with the union was at times, confusing. However, by conclusion of his testimony, including cross-examination, the Board observed that Mr. Mikalson had to his satisfaction, finally recalled in an accurate manner, the order and dates of certain key events.

Mr. Mikalson says he received the letter of suspension on December 4 or 5, 1990. He typed a detailed "statement of grievance" at home, dated it December 6, 1990, and attached the employer's letter of suspension. The morning of December 6, he and Art Mah, union steward, drove to the union office to file the grievance. He filled out the union's green complaint form in front of Mr. Mah, and stapled his statement to it. Because the office was very busy at the time Ken White, the grievance officer, could only briefly discuss the complaint. Ken White reviewed the statement and the employer's letter of suspension, and asked Mr. Mikalson to obtain an updated doctor's report confirming he could not work an 8-hour shift.

Mr. Mikalson says he left the complaint on Mr. White's chair that day. He went to see his doctor that afternoon, and the same day delivered an updated Occupational Health Services/Fitness Assessment form to the union office. In the following weeks, he also visited a knee specialist and obtained updated fitness assessments from three doctors. He provided this documentation to the union as part of a larger package of material, under subsequent cover letter of January 28, 1991. The material also included information about three new grievances he wished to file.

The Board observed that the object (Re:) line of the January 28, 1991 letter indeed identifies three new grievances Mr. Mikalson wished to file, and also a "grievance filed on 90 12 06." The letter, itself quite short, discusses the grievance of 90 12 06 that is noted in the object (Re:) line.

Art Mah testified that although unsure of the exact date, he remembers leaving work one morning around the time in question, to go to the union office with Mr. Mikalson. He is unsure today whether the purpose of that visit was to discuss an interview leading to the suspension or, if the suspension had been imposed and instead Mr. Mikalson wished to grieve. He thinks he and Mr. Mikalson may have started to fill out a green complaint form, but he does not specifically recall completing it.

Allan MacKinnon, then first vice-president of the Local, was asked to give evidence by Mr. Mikalson. He spoke of conversations he had with Mr. White around the time in question, when the two worked together as members of the union executive. He says that on several occasions Mr. White mentioned his tendency to confuse the employees Ross Mikalson and Lorne Gibson. He also testified that Mr. White specifically stated he had mistakenly filed Ross Mikalson's suspension complaint in Lorne Gibson's file and that by the time he found it, it was too late to file a timely grievance. Ken White told him he would call and advise Mr. Mikalson. Later Mr. White told Mr. MacKinnon he had made the call and apologized, and advised Mr. Mikalson he could complain to the Canada Labour Relations Board.

Ken White testified that he did not recall any filing mix-up in names, or advising Mr. MacKinnon of such an error. In fact he does not remember any visit to the union office by Mr. Mikalson and Art Mah in December 1990, nor briefly discussing the complaint with Mr. Mikalson as alleged.

Mr. White maintains instead, that he discovered the complaint form dated December 6, 1990, tucked inside the bundle of documents submitted later with the January 28, 1991 cover letter. This was the first time he had seen the form. He remembers the bundle of material was not in the grievance box on Friday, January 29, 1991. He found and reviewed it after the week-end, on Monday, February 4 or Tuesday, February 5, 1991. He agrees that the copy of Mr. Mikalson's complaint form marked as an exhibit indicates it his handwriting, "Found", and a date that appears to state "Feb. 7/91."

Mr. White testified that he remembers discussing this discovery with Mr. MacKinnon, then calling Mr. Mikalson to tell him the complaint form had been submitted too late to allow a timely grievance. He says he told Mr. Mikalson that two of the three new complaints referenced in the object (Re:) line of the January 28, 1991 letter were also untimely. However, he told Mr. Mikalson during that telephone call, that he would

process all of them as grievances anyway, including the matter of the December 1990 suspension without pay.

IV

On the preliminary issue, having considered the testimony and documentary evidence the Board concludes that Ross Mikalson did visit the union office with Art Mah on the morning of December 6, 1990. Mr. Mikalson left a complaint form with his statement of grievance attached to it and returned later the same day with an updated Occupational Health Services/Fitness Assessment form. We conclude then, that the complaint was provided to the union in a timely manner.

The Board further concludes that it was Mr. White's review on February 4 or 5, 1991 of the January 28 correspondence from Mr. Mikalson, that prompted him to search for the "grievance" Mr. Mikalson had noted and discussed in the letter. We conclude Mr. White found the complaint form on the date noted in his handwriting -- February 7, 1991.

V

Mr. Mikalson says the union's failure to file his grievance cannot be excused given the grievance filing system in use by the union. The evidence revealed the following about the system at the Calgary local of CUPW at the time.

The green colour of the complaint forms used to record employee complaints served as a visual cue. It reduced the risk of an employee complaint ending up in a larger pile of paper. The union used three labelled boxes to collect and separate employee complaints from three employee groups: the Internal, External and General Labour and Trades groups. CUPW was still administering three collective agreements,

having only recently won the representation rights for the larger unit found to be appropriate by the Board.

Most employee complaint forms were placed in the boxes by shop stewards, but employees did sometimes deposit them themselves. The union did not use a date-stamp to identify what date the complaint was received in the union office.

Mr. White checked the boxes at least twice a week. If processing of a complaint form could wait until the weekly union meeting, the complaint was put back in the box and grouped with others to be dealt with at the meeting. By bundling those complaints to be held for the weekly meeting, Mr. White could tell at a glance if any new complaints had since been added to the box.

If the time limits applicable to a complaint did not allow the union to hold and process the complaint at the weekly meeting, Mr. White was authorized to immediately file it as a grievance. Normally the union filed grievances with the employer each Wednesday.

Ideally, Mr. White and all chief stewards attended the weekly meetings at which the union decided which employee complaints to grieve. In practice, it was difficult for them to all be present. Mr. White would often have to review and process the complaints himself. If those present at the meeting could not process all of the complaints in the boxes each week, the oldest ones were dealt with first.

For those complaints to be grieved, Mr. White entered information into the computer system and generated an updated Grievance Register for each collective agreement. He assigned grievance numbers to complaints listed in the Register, and filled out the official Grievance Form bearing that number. This is the form that the employer must receive within the 25-day time limit.

Once filed with the employer, remaining copies of the grievance were stored alphabetically by employee name, in coloured file folders with the employee's name and grievance number written on them. Different colours of folders were used to differentiate types of grievances and the employee's work location.

VI

Mr. Mikalson's complaint about the grievance system raises an argument discussed by the Board in Cathy Miller (1991), 84 di 122 (CLRB no. 854), at page 132.

"CUPW's system for managing this tremendous volume of grievances does not have any special means of distinguishing between those grievances that are truly critical to individuals and those that are not. The system depends on the competence and assiduity of a relatively small number of officers. It seems strangely crude, bearing in mind the size of CUPW, its resources, its capacity for somewhat greater sophistication and its propensity to generate what seems even to the not unsympathetic observer an horrendous overload of grievances.

It might be argued that any reasonable person would conclude that the consequence of CUPW running such a system, and using the system in the way it seems to do, would inevitably be mistakes, some of which would be bound to have serious consequences; such mistakes, arising inevitably out of a system that any reasonable person could recognize as being seriously flawed, would in reality fall into the category of serious negligence."

We believe the concerns expressed by the Board in Cathy Miller, *supra*, apply equally well to the grievance filing system in place at Calgary, at the time in question. At best, the system placed great demands on a small number of union officers and chief stewards. In practice, it apparently drew heavily and unrealistically on the commitment and efforts of Mr. White. The Board finds Mr. Mikalson's concerns about the system are justified.

Certainly the Board is concerned about a system that does not appear to allow the union to prioritize complaints at the outset, according to their consequences. However, we conclude that the problem with Mr. Mikalson's suspension complaint was not one of prioritization. Further, it is hardly encouraging that the union processed the oldest complaints first whenever the union was unable to get to all those in the boxes in any given week. However, the grievance time limit applying to Mr. Mikalson's suspension complaint was not missed because of the system's inability to process complaints in a timely manner. As we conclude below, the complaint was misfiled or misplaced in some manner, thus denying it the benefit of the grievance processing system.

While CUPW's system of filing grievances may be crude, we acknowledge it provides a means to address issues of timeliness. Mr. White reviews the complaints in the boxes at least twice a week. Those requiring processing as grievances immediately because of time limits, are dealt with accordingly. The necessary connection between an employee complaint and this means of addressing timeliness is of course, that the complaint form end up in the collection box.

We do not say Mr. Mikalson is at fault for choosing to lodge his complaint at the downtown union office with Mr. Mah, rather than allowing Mr. Mah to deliver it himself as union steward. Nor can we say Mr. Mikalson must be accountable for his decision to leave the complaint form on Mr. White's chair; particularly given the union's use of the green form for employee complaints in order to avoid their misplacement. We simply note that the misfiling or misplacement might not have occurred had it been handled through the union's usual procedure for most complaints. The union steward discusses the complaint with the employee, a complaint form is completed, and the union steward delivers the completed form to the union office.

Having heard the evidence of both Allan MacKinnon and Ken White, both union executive members, we conclude that Mr. White indeed misfiled or misplaced Mr. Mikalson's complaint in some manner. More importantly, we are satisfied that Mr. Mikalson's complaint form did not end up in the collection box system for normal processing. Had that occurred, we have every reason to believe Mr. White could have processed the complaint in a timely manner. In these circumstances, is the union's failure to process the complaint in a timely fashion a violation of section 37?

VII

Section 37 of the Code states:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

Mr. Mikalson does not allege any bad faith in Mr. White's error. However, a union's action or inaction, even in the absence of bad faith, can be so arbitrary that it amounts in effect to a total failure to represent the employee. The Board discussed this in Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304). The Board stated at pages 324-325 of 41 di:

"But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence - it is total failure to represent ... Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake."

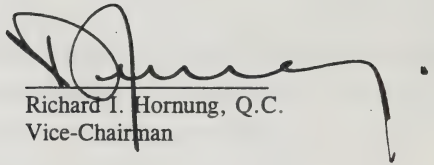
The Board concludes the union's failure to file Mr. Mikalson's complaint as a grievance in a timely manner does involve a degree of carelessness and negligence. Mr. Mikalson delivered the complaint to the union office in a timely fashion. The grievance officer found the form after the time period allowed for filing the grievance.

Although we recognize the error is not fully explained, we accept that Mr. White confused two employee names and that because of this, the complaint form was misfiled or misplaced. Given the evidence of Allan MacKinnon, we are also satisfied this was an honest mistake on Mr. White's part. We find the error he made at the time in question, to be one of simple negligence. We do not conclude the error arose from a non-caring attitude or a reckless manner.

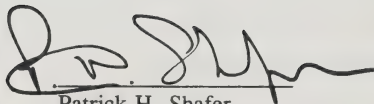
Although a computerized tracking system that identifies an approaching time limit could have alerted the union to the fact that a grievance had not been filed, and in turn that the complaint was missing, we believe that the problem lay in the fact that the complaint was not entered into the system in any way. Neither Ross Mikalson, Art Mah or Ken White deposited the complaint form in the collection box. There was then, nothing to track. Consequently, in the circumstances of this case, we cannot say that the absence of a date-tracking system is an inexcusable flaw in the grievance processing system.

While an unexplained failure by the union to ensure a complaint form was placed in the collection box would not be viewed well by this panel, we are satisfied on the evidence, that in this case, Mr. White's action in filing or placing the complaint form somewhere, albeit an incorrect filing or a misplacement, amounts to simple negligence.

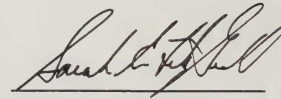
The Board does not find a violation of section 37. The complaint is dismissed.



Richard I. Hornung, Q.C.
Vice-Chairman



Patrick H. Shafer
Member



Sarah E. FitzGerald
Member

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Summary

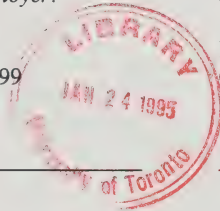
Résumé

Peter Hennessey, *complainant*, Canadian Union of Postal Workers, *respondent*, and Canada Post Corporation, *employer*.

Peter Hennessey, *plaignant*, Syndicat des postiers du Canada, *intimé*, et Société canadienne des postes, *employeur*.

Board File: 745-4622
CLRB/CCRT Decision no. 1099
December 20, 1994

Dossier du Conseil: 745-4622
CLRB/CCRT Décision n° 1099
le 20 décembre 1994



The complainant, an employee of Canada Post Corporation, was placed on "leave without pay" by his employer. The complainant wished to grieve this decision and met with the president of his local union to discuss the matter. According to the complainant, the subsequent failure of the Canadian Union of Postal Workers to file a grievance within the time limits set out in the collective agreement is a breach of the duty of fair representation set out in section 37 of the Canada Labour Code.

Un «congé sans rémunération» a été imposé au plaignant, un employé de la Société canadienne des postes. Ce dernier voulait se plaindre de cette décision et a rencontré le président de sa section locale pour en discuter. Selon le plaignant, le fait que le Syndicat des postiers du Canada n'a pas par la suite déposé de grief dans les délais prescrits par la convention collective constitue un manquement au devoir de représentation juste prévu à l'article 37 du Code.

At the time he discussed the matter with the local president, the complainant provided the employer's letter that placed him on leave without pay. He left that meeting believing that the union would file a grievance on his behalf.

Au moment où il a discuté de l'affaire avec le président de la section locale, le plaignant a fourni la lettre dans laquelle l'employeur lui apprenait qu'on lui imposait un congé sans rémunération. Lorsqu'il a quitté cette réunion, il croyait que le syndicat allait déposer un grief en son nom.

The Board found the local president did agree to take care of the matter. First, he tried to resolve the complaint informally, in telephone calls with employer representatives. He did not succeed. He then telephoned the complainant's house twice the same day, but no one answered. He did not try and reach the complainant again. He assumed the complainant did not wish to proceed with the matter because the complainant did not deliver documentation the local president had requested. The local president did not refer the matter to the local's grievance officer.

The complainant tried to contact the local president several times after their initial discussion. Each time the local president was absent. The member of the union executive that took those calls could not confirm whether a grievance had been filed, and suggested the complainant call back.

The Board found that the actions of the local president and the union executive member taking the telephone calls exhibited a degree of carelessness and negligence amounting to arbitrary conduct within the meaning of section 37 of the Code. The union had abdicated its responsibility towards the complainant. The Board ordered that a grievance be filed, and time limits waived. The Board further ordered that the union pay for independent counsel for the complainant, and that the union pay the interest portion of any award an arbitrator might make, up to the date of the Board's decision.

Le Conseil juge que le président de la section locale a accepté de s'occuper de l'affaire. En premier lieu, le président a tenté, en vain, de régler le grief de façon informelle, en téléphonant aux représentants de l'employeur. Il a par la suite téléphoné au plaignant à deux reprises dans la même journée, mais personne n'a répondu. Il n'a pas tenté de rejoindre de nouveau le plaignant. Il a présumé que le plaignant ne voulait pas qu'on donne suite à son grief parce que celui-ci n'avait pas fait parvenir les documents que le président de la section locale avait demandés. Le président n'a pas renvoyé l'affaire à l'agent de griefs de la section locale.

Le plaignant a tenté de communiquer avec le président de la section locale à plusieurs reprises à la suite de leur première rencontre. À chaque appel, le président était absent. Le dirigeant syndical qui a pris l'appel ne pouvait confirmer qu'un grief avait été déposé, et a suggéré au plaignant de rappeler.

Le Conseil juge que les mesures prises par le président de la section locale et par le dirigeant syndical qui a pris l'appel font preuve d'un certain degré d'insouciance et de négligence qui équivalait à une conduite arbitraire au sens de l'article 37 du Code. Le syndicat s'est désisté de ses responsabilités face au plaignant. Le Conseil ordonne qu'un grief soit déposé et que les délais soient annulés. En outre, le Conseil ordonne que le syndicat paie les honoraires d'un avocat au plaignant ainsi que la portion des intérêts de toute indemnité que l'arbitre pourrait ordonner, jusqu'à la date de la décision du Conseil.

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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Peter Hennessey,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 745-4622

CLRB/CCRT Decision no. **1099**

December 20, 1994

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chairman, and Mr. Patrick H. Shafer and Ms. Sarah E. FitzGerald, Members. A request for adjournment was heard and granted by the Board in Calgary, on May 19, 1994. The case was heard in Calgary, August 16, 1994.

Appearances

Mr. Peter Hennessey, on his own behalf, accompanied by his wife;

Ms. Catherine McCreary, counsel for the union, assisted by Mr. Darren Steinhoff of the union; and

Canada Post Corporation represented by Counsel Sean Michael Kennedy.

These reasons for decision were written by Sarah E. FitzGerald, Member.

I

Mr. Hennessey claims that the Calgary local of the Canadian Union of Postal Workers (CUPW or the union) breached the duty of fair representation set out in section 37 of the Code. He says the union did so when it failed to file his grievance within the 25-day time limit set out in the collective agreement. Mr. Hennessey wanted to grieve the employer's decision placing him on leave without pay.

II

Certain facts appear to be undisputed. Mr. Hennessey stopped work at Canada Post Corporation (the Company) on May 30, 1991. He complained of ongoing neck pain arising from prior injuries. His doctor recommended that he not return to work until sometime after July 6 and a reexamination.

Mr. Hennessey applied for and was approved for leave with pay for the period of May 31 to July 5, 1991. However, the Company had on June 3, asked that Mr. Hennessey be examined by the company's doctor. On June 14, the doctor concluded that Mr. Hennessey's absence could no longer be authorized on physical grounds, and he must return to work. He told Mr. Hennessey however, that he would accept an application for leave on mental grounds, because of Mr. Hennessey's depression.

Mr. Hennessey disputed this assessment and visited his own doctor, who in turn spoke with the company doctor. The company doctor reiterated his view and by subsequent memo of June 24, advised the company's chief occupational nurse of his position. In that memo, he stated that he expected the company would receive a request from Mr. Hennessey in the near future, to change the grounds in support of his application for leave.

Mr. Hennessey did not return to work. By letter of June 20, 1991, Mr. Whitehead, a supervisor, advised him that he had been placed on leave without pay. The letter states that as Mr. Hennessey was not taking any specific form of treatment for depression other than medication, his continued absence was unauthorized.

Mr. Hennessey received that letter on June 20, 1991. The same day he met with Darren Steinhoff, who was the Local's president. He wanted to grieve the employer's decision.

III

Mr. Hennessey testified that during their June 20 meeting, Mr. Steinhoff told him "he would take care of the matter". He left believing that Mr. Steinhoff would file a grievance for him. Subsequently, he telephoned Mr. Steinhoff twice to ask about his grievance, and dropped in to see him on another two occasions. Each time Mr. Steinhoff was absent. Finally, around July 10, just before leaving on a trip to Newfoundland, Mr. Hennessey spoke with Allan MacKinnon of the union executive. Mr. MacKinnon advised him that Mr. Steinhoff would be taking care of the grievance. Mr. MacKinnon could not confirm whether a grievance had been filed, and suggested that Mr. Hennessey call in from Newfoundland to check on it.

A Newfoundland CUPW union representative called Calgary on Mr. Hennessey's behalf. Mr. Hennessey says that the representative advised him after the telephone call, that "everything had been taken care of."

Mr. MacKinnon remembers receiving that telephone call from Newfoundland. Once again Mr. Steinhoff was not available. Mr. MacKinnon maintains he told the Newfoundland representative that "there is nothing to indicate the grievance is not going ahead". He says he based that response on a check he made during the telephone call, of the Grievance Register and a file folder labelled with Mr.

Hennessey's name. Although the file folder contained only the June 20 letter from Mr. Whitehead, Mr. MacKinnon placed more reliance on the Grievance Register. Some grievances are called in to the employer by the regional office, and consequently, the Local's copy might not yet have arrived. Or, the Grievance Form may have been completed and stacked with others to be filed with the employer at the next weekly meeting.

IV

Mr. Steinhoff remembers that Mr. Hennessey was angry and upset when he arrived at the union office on June 20, 1991 to discuss the supervisor's letter. He maintains he asked Mr. Hennessey to provide a copy of the application for sick leave showing the employer's refusal, and further, that he stated, "the sooner we get this in, the better". Mr. Steinhoff says that despite Mr. Hennessey's agitated state, he felt Mr. Hennessey understood his request and that he didn't think it would be a problem for Mr. Hennessey.

For his part, Mr. Hennessey denies that Mr. Steinhoff asked him to provide a copy of the application for leave showing the employer's refusal. Mr. Hennessey says he believed at the time, that the June 20 letter was a sufficient basis to file the grievance. Mr. Steinhoff testified that at the time in question, Mr. Hennessey's complaint with Ken White, union grievance officer. He "felt it would not be productive" to turn the file over to the grievance officer until he received the requested information. Mr. Steinhoff explained that he had assisted Mr. Hennessey at the time the company requested examination by the company doctor. Consequently, he felt it was more appropriate and of assistance to the grievance officer, that he gather the initial information.

Mr. Steinhoff gave evidence of his informal attempts to resolve Mr. Hennessey's complaint after their meeting of June 20, 1991. He telephoned Mr. Whitehead the

same day to see if he would change his decision. He would not. A week later he telephoned Mr. Whitehead's boss, Mr. Guerling. He agrees he made that call on the assumption that the June 20 letter represented a refusal to honour an application for sick leave made by Mr. Hennessey. Unable to make headway with Mr. Guerling either, Mr. Steinhoff asked Mr. Guerling to provide him with a copy of the application for sick leave showing the employer's refusal.

Mr. Steinhoff says that after his telephone call to Mr. Guerling, he telephoned the Hennessey residence twice the same day. No one answered. He did not try and reach Mr. Hennessey again. As he did not receive the requested documentation, he assumed Mr. Hennessey did not wish to proceed with the complaint.

Mr. Steinhoff explained to the Board the reason why he wished to have more information from Mr. Hennessey before passing the matter to the grievance officer. At the time in question, the union was passing responsibility to the employees to gather grievance information. Mr. Steinhoff advised that many of the thousands of grievances filed by the union had been found to have insufficient documentation to establish violations of the collective agreement. He did not say at what stage of CUPW's grievance process these determinations were made, or of any efforts by CUPW to contact grievors to obtain additional information before dropping the grievances. Neither did he speak of any particular means by which CUPW informed employees of this apparently new responsibility to provide supporting documentation before a grievance would be filed, and the consequences of a failure to do so within a certain time frame.

V

Mr. Hennessey did not learn of CUPW's failure to file his grievance until February of 1992 when he met with Ken White, grievance officer. On that day Mr. Hennessey delivered recent correspondence concerning the grievance he thought had been filed

by the union, in July of 1991. When Ken White discovered a grievance had never been filed he agreed to file one, using the recent correspondence as support for the complaint, to try and bring it within the time limits.

There was some suggestion that Mr. Hennessey's complaint to the Board was untimely given the provisions of section 97(2) of the Code. Mr. Hennessey did not learn of the union's decision to drop his grievance until September 23, 1993. Mr. Hennessey filed his complaint with the Board on September 29, 1993. The complaint is timely.

VI

The Board concludes that on June 20, 1991, Mr. Steinhoff, Local president, did indeed agree to take care of the matter of Mr. Hennessey's complaint. He intended to try and resolve the matter informally first. He believed an application for leave had been denied. He even requested documentation from the employer in a telephone call. Despite this, Mr. Steinhoff did not arrange for the filing of a grievance within the applicable time limits.

The Board understands why a union handling thousands of grievances might wish to seek the assistance of the employees in obtaining and providing documentation to support their complaints. Nonetheless, the grievance procedure is an employee's sole avenue of recourse. The union must take care to ensure that complaints are not barred as untimely, simply because the employee does not or perhaps cannot provide supporting documentation satisfactory to the union within the time limits for filing the grievance. Certainly this is so in this case where, well within the time limits for filing a grievance the union was already in possession of the June 20 letter identifying the employer's action of which Mr. Hennessey complained. There is a distinction to be drawn between documentation sufficient to identify the employer's conduct in issue and form the basis for a grievance, and documentation to be presented in support of the case.

We are satisfied that even if Mr. Steinhoff asked Mr. Hennessey to obtain a copy of the application for leave showing the employer's refusal, he did not advise that a grievance would not be filed unless he received that information. Given the contents of the June 20 letter already in Mr. Steinhoff's possession, the Board would have been concerned in any event, had he taken this approach. Ken White, the Local's grievance officer candidly admitted to the Board, that the June 20 letter provided a sufficient basis to file the grievance.

Simply put, we accept that Mr. Steinhoff told Mr. Hennessey that he would take care of the matter. He commenced to do exactly that, but after two attempts to telephone the Hennessey residence the same day, Mr. Steinhoff dropped the ball. As he made no further attempt to reach Mr. Hennessey by phone or mail, the Board suspects Mr. Steinhoff simply forgot the matter. As he had not advised the union's grievance officer of Mr. Hennessey's complaint, the usual system for processing employee complaints in a timely manner was not activated.

VII

Section 37 of the Code states:

"A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

Mr. Hennessey does not allege any bad faith in Mr. Steinhoff's error. However, a union's action or inaction, even in the absence of bad faith, can be so arbitrary that it amounts in effect to a total failure to represent the employee. See Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,098 (CLRB no. 304). The Board stated at pages 324-325 of 41 di:

"But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence - it is total failure to represent ... Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake."

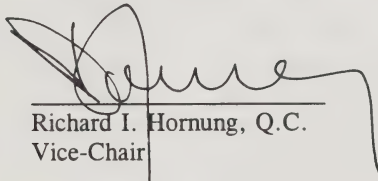
In our view CUPW must bear responsibility for Mr. Steinhoff's statement that he "would take care of the matter". The Board is also of the view that Mr. MacKinnon furthered the union's error, when on July 10, having spoken with Mr. Hennessey, he took no positive action to communicate Mr. Hennessey's concerns about time limits to Mr. Steinhoff, nor ascertain whether in fact, a grievance had been filed. Similarly, if the Newfoundland telephone call took place within a 25-day time limit applicable to Mr. Hennessey's complaint, once again Mr. MacKinnon erred in not following up with Mr. Steinhoff to relay Mr. Hennessey's concerns and determine whether the grievance had been filed.

The Board concludes that the actions of Mr. Steinhoff and of Mr. MacKinnon exhibited a degree of carelessness and negligence that amounts to arbitrary conduct, and an abdication of the union's responsibility towards Mr. Hennessey. The negligence is of a kind sufficiently serious or gross that we do not view the union's actions as fair. We consider the conduct to be of the kind contemplated in the discussion at page 131 of the Cathy Miller (1991), 84 di 122 (CLRB no. 854). Accordingly we find then that the union did violate the section 37 duty of fair representation.


The Board orders that:

1. CUPW initiate a grievance for Mr. Hennessey's complaint, and refer the matter to arbitration forthwith;
2. The time limit for filing a grievance, and any other time limits under the collective agreement which might be a bar to arbitration are hereby waived;

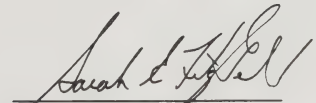
3. The complainant, Mr. Hennessey, is entitled to be represented by independent counsel of his choice for the purposes of arbitration. CUPW is directed to pay all reasonable legal fees and expenses for such representation.
4. In the event Mr. Hennessey succeeds in his arbitration and the arbitrator makes an award of compensation with interest, CUPW shall be responsible for the interest portion of that award, to the date of this decision.
5. The Board retains jurisdiction with respect to the implementation of this order.



Richard I. Hornung, Q.C.
Vice-Chair



Patrick H. Shafer
Member



Sarah E. FitzGerald
Member

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Summary

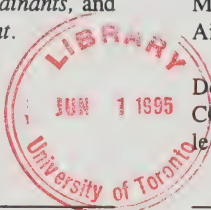
Marie-Claire Hayes et al., *complainants*, and
Air Transat A.T. Inc., *respondent*.

Board File: 745-4577
CCRT/CLRB Decision no. 1100
December 21, 1994

Résumé

Marie-Claire Hayes et autres, *plaignants*, et
Air Transat A.T. Inc., *intimée*.

Dossier du Conseil: 745-4577
CCRT/CLRB Décision n° 1100
le 21 décembre 1994



The Board received from certain flight attendants who used to work for Nolisair International Inc. (Nolisair) a complaint of unfair labour practice filed pursuant to sections 94(3)(a) and 96 of the Code. The complainants alleged that Air Transat illegally refused to hire them as flight attendants following the shutdown of Nationair, in the spring of 1993. They claimed that the employer, by questioning them about their opinions and past union activities during job interviews and by refusing to hiring them in that context, violated the Code.

According to the complainants, a basic principle of interpretation and application of the Code is involved in this case, that is, is an employer allowed, during the selection process, to question candidates on past union activities and on their interpretation of the collective agreement and then use the answers given in assessing the candidates.

For its part, the employer submitted that the questions asked of the candidates on their past union activities and on their interpretation of a provision of the collective agreement were not per se illegal and that the answers given were not used in deciding to hire or not to hire them.

Le Conseil a reçu de certains agents de bord qui travaillaient auparavant chez Nolisair International Inc. (Nationair) une plainte de pratique déloyale fondée sur l'alinéa 94(3)a) et sur l'article 96 du Code. Les plaignants allèguent qu'Air Transat a illégalement refusé de les embaucher comme agents de bord après la fermeture de Nationair, au printemps 1993. Ils prétendent que l'employeur, en les interrogeant sur leurs opinions et leurs activités syndicales passées lors d'entrevues de sélection, et en refusant de les embaucher dans ce contexte, a violé le Code.

Selon les plaignants, un principe fondamental d'interprétation et d'application du Code se pose en l'instance, à savoir un employeur peut-il, lors du processus de sélection, interroger un candidat sur ses activités syndicales antérieures et sur son interprétation de la convention collective et ensuite utiliser les réponses obtenues dans l'évaluation de ce candidat.

Pour sa part, l'employeur soutient que les questions qui ont pu être adressées aux candidats sur leurs activités syndicales et sur leur interprétation d'une disposition de la convention collective ne sont pas en soi illégales et que leurs réponses n'ont pas servi à les favoriser ou à les écarter.

The Board determined that for an employer to take an interest in the candidates' past union activities during the selection process does not constitute per se a violation of the Code. Yet, there is no doubt that this approach could very well give rise to such a violation if the employer could not explain in a reasonable and clear manner the reasons for its decision not to hire a candidate who received that treatment. In this case, the Board concluded that the hiring process and the way it was applied in general do not a priori point to a breach of the right of association protected by the Code. The evidence does not allow the Board to conclude that Air Transat systematically refused to hire union supporters nor that the candidates' past union activities constituted the reason for refusing to hire the majority of them, whose complaints it dismissed.

On the other hand, the Board concluded that the complaints of four complainants had merit, since the employer had not satisfied the Board, as required by section 98(4) of the Code, that the union activities and opinions of these complainants had not, even incidentally, motivated the employer's decision to hire them as flight attendants.

The Board ordered the employer to hire those complainants as flight attendants.

Le Conseil a décidé que le fait pour un employeur de s'intéresser aux activités syndicales antérieures des candidats, lors du processus de sélection, ne constitue pas en soi une violation du Code. Par ailleurs, il ne fait pas de doute que cette façon de faire risque d'entraîner une telle violation si l'employeur ne peut expliquer de manière raisonnable et claire les motifs de sa décision de ne pas embaucher un candidat soumis à ce genre de questions. Dans le cas présent, le Conseil a conclu que le processus d'embauchage et la façon dont il a été généralement appliqué ne démontrent pas, a priori, une atteinte au droit d'association protégé par le Code. La preuve ne permet pas de conclure qu'Air Transat a systématiquement refusé les candidatures de militants syndicaux ni que les activités syndicales des candidats ont constitué un motif de refus d'embauchage pour la majorité d'entre eux, dont il a rejeté les plaintes.

Par contre, le Conseil a conclu que les plaintes de quatre plaignants étaient fondées, puisque l'employeur n'a pas convaincu le Conseil, comme l'exige le paragraphe 98(4) du Code, que les activités et les opinions syndicales de ces plaignants n'avaient pas motivé, au moins de façon incidente, son refus de les embaucher à titre d'agents de bord.

Le Conseil a ordonné à l'employeur d'embaucher ces plaignants à titre d'agents de bord.

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LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Marie-Claire Hayes et al.,

complainants,

and

Air Transat A.T. Inc.,

respondent.

Board File: 745-4577

CCRT/CLRB Decision no. 1100

December 21, 1994

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. Robert Cadieux and François Bastien, Members. A hearing was held on November 29, 1993, March 8, 9, 10, 28, 29, 30 and 31, 1994, June 20 and 21, 1994 and September 9, 1994, at Montréal.

Appearances

Mr. John Elder, assisted by Mrs. Marie-Claire Hayes, for the complainants;

Mr. Jean-François Lemay, assisted by Mrs. Marie-Josée Trudel, for the employer.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The proceeding

In this complaint of unfair labour practice, made pursuant to sections 94(3)(a) and 96 of the Canada Labour Code, Part I - Industrial Relations, sixteen flight attendants formerly employed by Nolisair International Inc. (hereinafter Nationair) allege that Air Transat (hereinafter the employer) contravened the Code by refusing to hire them as flight attendants in the spring of 1993, following selection interviews during which they were asked questions and comments on past union activities. The questions

asked at the interviews dealt in particular with the complainants' union activities during the lockout that affected Nationair's flight attendants between November 1991 and February 1993, and with their views on the events and consequences of that lockout. The complainants further allege that the employer asked them how they would react if, on their first day of work at Air Transat, they were called to work beyond the regularly scheduled hours provided for in the collective agreement.

Sections 94(3)(a) and 96 of the Code stipulate the following:

"94. (3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

II

The facts

1. The context
- (a) The employer

Air Transat is an airline specializing in charter transportation. Its major activities are based at Mirabel International Airport.

In the spring of 1993, Air Transat's traffic volume increased significantly because of problems at Nationair, its largest competitor. When Nationair ceased operations in March 1993, Air Transat enlarged its fleet and took over a large portion of Nationair's flights. To cope with this sudden and major expansion of its operations, Air Transat had to quickly hire a huge number of flight personnel.

New flight director and purser positions were filled through internal posting. The new flight attendant positions were offered to outside candidates, in particular to former Nationair flight attendants. These positions were staffed using a particular procedure on which there will be more later. Between April and June 1993, the number of flight attendants at Air Transat doubled: some 330 persons were hired. Air Transat received 2000 job applications and some 1000 selection interviews were held. One hundred and sixty of the flight attendants hired at the time were previously employed by Nationair. Of this number, fifteen had performed union duties at Nationair. Two candidates who had also performed such duties declined offers of employment with Air Transat, while sixteen others, i.e. the complainants, were refused employment.

(b) The unions

Nationair's flight attendants were certified in 1986, following a long series of hearings (see Nationair (Nolisair International Inc.) (1986), 67 di 217 (CLRB no. 596)). When Nationair ceased operations, the flight attendants were represented by a local of the Canadian Union of Public Employees, Airline Division. They had their own bargaining unit which was separate from the units comprising the pursers and flight directors respectively. At Air Transat, the flight attendants, pursers and flight directors all belonged to the same bargaining unit which was also represented by the Canadian Union of Public Employees, Airline Division. Their local and the flight attendants' local at Nationair were separate entities.

In fact, because these two locals were affiliated with the same union, they were in regular contact and shared, among other things, office space at the Airline Division's office in Montreal.

2. The selection process

(a) The interview plan and the assessment sheet

In the spring of 1993, Mr. Denis Morrison, the employer's Director of Human Resources, asked Mrs. Marie-Josée Trudel, recruitment and staffing counsellor in the Human Resources Department, to organize and supervise the selection process for flight attendants. Mrs. Trudel did not receive any specific instructions from her superiors on how to proceed. She prepared an interview plan and an assessment sheet that were used for all the interviews for flight attendant positions, including the interviews with Nationair's flight attendants. The objective was to ensure that the interviews were conducted based on an identical plan, and that the selection committees used the same candidate assessment tool.

The interview plan included questions on education and work experience. A series of questions dealt with the work of a flight attendant and the qualities and personal preferences of the candidates. The question dealing with the extension of hours of work, the legality of which the complainants are contesting, was part of this series of questions. It is worded as follows: "The first flight you work at Air Transat is late arriving at its destination, and you see, upon arrival, that you will be working 1 hour and 15 minutes beyond your normal hours of work as provided for in your collective agreement. What do you do?"

The interviewers also had in their possession an assessment sheet on which they rated, on a scale of 1 to 5, i.e. from weak to strong, such factors as personal appearance, communication in English and French, enthusiasm, co-operation, flexibility and

interest. The passing marking was 42, but did not guarantee a candidate a job. In fact, some candidates who obtained a higher mark were not hired.

(b) The interviews

Candidates first underwent an initial interview. If they were not hired following this interview, they were interviewed a second time. The purpose of this interview was to evaluate in greater depth some technical aspects relating to work experience as a flight attendant and ability to respond to difficult situations. With few exceptions, all the rejected candidates were interviewed a second time by different selection committees. The interviewers were not necessarily aware of the results of the first interview, and these results were not compared with the results of the first interview before a decision was made.

The interviews were conducted by a number of committees each comprising two Air Transat employees (e.g. managers, flight directors, pursers). The participation of flight managers and pursers in the selection process was the result of a request to this effect made by the director of the In-Flight Service to the vice-president of the union component, Mr. Michael Butler, himself a flight director.

The interview plans and selection sheets were given to the interviewers at preparatory meetings designed to explain the selection procedure. They had to follow the interview plan and complete the assessment sheet. If candidates did not provide clear answers to the questions, the interviewers were free to ask further questions to obtain the details they considered useful.

The decision on whether or not to hire candidates was made immediately by the selection committees and communicated to the Human Resources Department. No provision was made for co-ordination or some other form of control and supervision

of these decisions. This undoubtedly explains why, generally speaking, the employer followed on the decisions of the selection committees.

(c) The instructions to the selection committees

The selection committees received no specific instructions concerning candidates' union activities. This subject was nevertheless broached in greater or lesser detail, depending on the case, at the interviews. The lockout period in particular was examined and almost all the complainants were questioned about it. Mrs. Trudel, for her part, stated that she was not interested in the union activities per se. She was more interested in knowing what candidates had done during that lengthy period in order to determine whether they had acquired knowledge or experience related to a flight attendant's job.

Despite Mrs. Trudel's statements, the evidence showed that she had asked some candidates what they had gained from their participation in union activities and that she had shown an interest in their personal motivation. She maintained, however, that the sole purpose of these questions was to shed light on candidates' perceptions and personal opinions, and that the answers were not to be used to assess them on their union activities.

According to Michael Butler, the questions concerning union activities during the lockout period established whether candidates possessed leadership ability, whereas the purpose of the question on the extension of the workday was to assess teamwork capability, and nothing else. In his opinion, the persons questioned about these subjects did not seem embarrassed and did not appear to experience any discomfort.

Some of the complainants did not share this view. They stated that they were both surprised and frustrated at being questioned about their union activities, especially those who had performed more "visible" union activities or who had been more

active, such as members of the executive committee or the bargaining committee. The evidence reveals that they were questioned in greater detail regarding both the nature of their activities and their reasons for choosing such activities.

For example, Mrs. Trudel asked Dale Humphrey, who had served as vice-president and president of the Toronto local and as a member of the bargaining committee, how he felt after his efforts had failed, clearly alluding to the outcome of the labour dispute at Nationair. She asked him if he could put this behind him and begin working again for another employer. When asked to give his reasons for deciding not to become a purser, Mr. Humphrey replied that he had chosen to remain in the flight attendants' bargaining unit in order to continue to improve their working conditions at a time when relations with the employer were especially difficult.

Marie-Claire Hayes organized the flight attendants' union at Nationair in the mid-80's she served as president of the Nationair component, president of the Montréal local during the lockout and served as a member of the consultation committee on bargaining. Mrs. Trudel asked her which union position she occupied. Mrs. Hayes pointed out to her that she was undoubtedly aware that she was president of the union. Mrs. Trudel agreed, smiling. She then took an interest in the fact that Mrs. Hayes seemed to be much more heavily involved in union activities than the other employees. Mrs. Hayes explained why this was so. She was not hired following this interview.

At Nationair, Marie-Claire Hayes was an in-flight service manager, the equivalent of the position of flight manager at Air Transat. According to Mrs. Trudel, this candidate certainly would have been an asset to Air Transat in a supervisory position, but was overqualified for a flight attendant position. This was why, testified Mrs. Trudel, no assessment sheet was completed on Mrs. Hayes because, according to her, any mark given to Mrs. Hayes would have been "superfluous." However, two

candidates who had occupied the position of in-flight service manager at Nationair were hired, which was not the case with Mrs. Hayes.

(d) References

Reference checking of Nationair's flight attendants with the former employer was inconsistent, if not haphazard. This was partly the result of Nationair's ceasing operations, but it should also be noted that Mrs. Trudel's recollection of this procedure was particularly poor. She testified that she obtained information on approximately half of the candidates from Nationair. She obtained this information from Mrs. Lynn Burley, director of the Toronto base and subsequently of the In-Flight Service in Toronto, and from Mrs. Diane Holmes, the person in charge of initial training and requalification of Nationair flight attendants at Mirabel. Mrs. Trudel knew these individuals when she worked in the Human Resources Department at Nationair in the early 90's. She discussed a number of candidates informally by telephone with these two persons. She did not ask them whether they had worked with the candidates in question or supervised them. She could not identify the candidates about whom she made inquiries or on whom she obtained references, because she did not write down this information, apparently because of time constraints and the urgency of the situation. She could not therefore provide details on either the content or the nature of the information obtained, except for certain candidates including Lawrence Huot and Joe Rosado.

Mrs. Trudel sat on the selection committee that interviewed Mr. Rosado, and she interviewed Mr. Huot alone. She decided not to hire them on the basis of the information she had obtained from Mrs. Burley. Mrs. Burley described Messrs. Huot and Rosado as being never satisfied and as complainers and negative persons. She did not personally work with these complainants, nor did she supervise them. She dealt with Messrs. Huot and Rosado in her capacity as employer representative when these complainants were serving as union representatives who, just like her, were

responsible for interpreting and applying the collective agreement. Mrs. Trudel stated that she trusted Mrs. Burley's judgment and that she made the decision not to hire Mr. Rosado, whom she nevertheless described as an ideal candidate, or Mr. Huot, on the strength of the information obtained from Mrs. Burley.

III

The positions of the parties

1. Air Transat's position

Air Transat argued that the employer harboured no anti-union animus towards the complainants and that it did not take their past union activities into account in its decision not to hire them.

According to the employer, the Board must assess the evidence as a whole, paying particular attention to the circumstances and the context of these hirings and the employer's general conduct during this process. The urgency that existed in the spring of 1993, the fact that all the interviewers used the same interview plan and the same assessment sheet for all candidates they interviewed, including the unionized employees, and the absence of any directive or indication concerning employees' past union activities were all key pieces of evidence. Finally, the hiring of fifteen candidates who served as union officers or representatives at Nationair also constituted probative evidence in assessing the employer's good faith.

The assessment of some aspects of the events that gave rise to this complaint was very subjective. Both the interviewers and the candidates gave their own interpretation of the conduct of the interviews and of their results, and these subjective considerations should be disregarded. The employer was quite prepared to admit that mistakes may have been made in the selection or rejection of certain candidates. This, however, was

not the issue and these mistakes did not compromise the legality of the selection procedure followed or the employer's decisions.

The questions regarding union activities and the extension of the workday were not illegal per se, and the answers given were not used to favour or disqualify certain candidates. Their purpose was to identify experience acquired over a long period that coincided with a lengthy labour dispute, and Air Transat had reason to be interested in this information. The curriculum vitae of the former president of the National component, Lawrence Huot, listed his past union activities. Consequently, neither he nor the other candidates should be surprised if a potential employer asked questions about these activities. As for the question concerning the extension of the workday, there was a clear and legitimate reason for asking it because it was a particularly sensitive issue in the airline industry. This question was not illegal per se. However, it could have become so had the evidence revealed that the answers to it were used to disqualify candidates, which was not the case here.

2. The complainants' position

The complainants argued that a fundamental principle of interpretation and application of the Code was at issue: could an employer, during the selection process, query candidates about their past union activities and their interpretation of the collective agreement and then use the answers obtained in assessing these candidates? The complainants argued that the mere fact of an employer's subjecting candidates to detailed questioning regarding their union experience and activities contravened the Code. Consequently, any refusal to hire someone in such a context was in itself tainted. The complainants maintained that a dangerous precedent would be set if the Board condoned employer behaviour such as that displayed here by Air Transat.

The importance attached to questions on union activities and the personal opinion of certain candidates on the lockout and its consequences had nothing to do with an

employer's right to assess the competence of candidates based on the requirements of a position. In this sense, merely asking these questions belied the employer's claim that it was not interested in the union activities per se.

The length of the workday specified in the collective agreement was the result of collective bargaining, and it bound the employer, the union and the employees. An employer could not determine the worth of a candidate based on answers that would enable it to assess the degree to which this candidate was prepared to ensure compliance with the collective agreement. This was an unlawful limitation on the exercise of the right of association of a person seeking employment.

In the complainants' view, the lack of credibility of the employer's principal witness, Mrs. Marie-Josée Trudel, was decisive. They specifically pointed in this regard to the unreliability of the references obtained on Lawrence Huot and Joe Rosado. Although Mrs. Burley was in no position to provide these references, Mrs. Trudel still relied on them to make her decisions. Moreover, she recalled only references obtained on the most active union members and was unable to provide details of the references obtained on other candidates such as Lucie Gervais, Samantha Rossetti or Ahmed-Zacharie Seif. In the complainants' opinion, key elements of Mrs. Trudel's testimony lacked credibility and should be disregarded.

IV DECISION

In the present case, the Board must determine whether an employer that shows an interest in the past union activities of job candidates contravenes the Code, specifically sections 8 and 94. If not, the Board must decide whether, in the instant case, the employer contravened the Code, specifically section 94(3)(a)(i), in refusing to hire the complainants in the circumstances revealed by the evidence.

Past union activities

Section 8(1) of the Code confers on employees the right of freedom of association. It states the following:

"8. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."

Section 94 prohibits an employer from impeding the free and full exercise of this right. Section 94(3)(a)(i) specifically prohibits an employer from refusing to employ a person because the person has participated in union activities. This prohibition is aimed explicitly at the refusal by an employer to hire a person because of the person's past union activities (see Frederick Transport Ltd. (1987), 70 di 106 (CLRB no. 634); and Scotian Shelf Traders Limited (1983), 52 di 151; 4 CLRBR (NS) 278; and 83 CLLC 16,070 (CLRB no. 437)).

The evidence of the contravention of the Code by an employer who is alleged to have impeded the free exercise of the right of association is a factual question that is assessed on a case-by-case basis. The Code does not define in precise or absolute terms an employer's obligations in this regard. The Board cannot therefore automatically conclude that the right of freedom of association is contravened when there is evidence that a person who previously participated in union activities of which the employer asked questions during the selection process is refused employment.

(2) Did the employer contravene the Code?

The fact that an employer would show interest during the selection process, in the past union activities of candidates does not constitute per se a violation of the Code. However, it is clear that this approach could give rise to such a violation if the employer cannot provide a reasonable and clear explanation of the reasons for this

interest. In the present case, the Board must determine whether the refusal to hire the complainants is based on their past union activities, regardless of whether or not these activities are an incidental cause of this refusal, and whether the reasons given by the employer to justify this refusal are a pretext or the real reason for its decision. In Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443), the Board said the following in this regard:

"The Board, as is well known, has consistently held, in interpreting the provisions of sections 184(3)(a)(i) to (vi) [now sections 94(3)(a)(i) to (vi)] of the Code, that anti-union animus or motivation must be an essential element of any violation of these provisions. The Board must therefore determine whether, in dismissing the complainant, the employer was either motivated by anti-union animus or whether this motivation was also present if it were established that the employer claimed to have or in fact had just cause to dismiss the employee."

(page 118)

Moreover, in Transport Papineau Inc. (1990), 83 di 185 (CLRB no. 842), the Board distinguished the notion of pretext from the notion of the real reason for an employer's actions:

"When examining the merits of a complaint of unfair labour practice, the Board must be satisfied that the employer has not taken actions to limit or impede the legitimate exercise by employees of the rights conferred by the Code. The employer's actions must not be motivated by anti-union animus, but must be for cause. This does not mean, however, that it is up to the Board to determine whether the reasons given by the employer to justify the action are valid, fair and commensurate with the seriousness of the alleged offence. The Board has no authority to determine whether the penalty imposed is commensurate with the alleged offence (see Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Pierre Fiset (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473)).

The Board, however, can examine the nature of the cause alleged by the employer, not to assess its fairness or determine its validity

having regard to the context in which it is alleged, but to determine whether it has the appearance of a pretext. This approach enables the Board to satisfy itself that this is indeed the real reason for the penalty and not an excuse or a pretext that masks anti-union animus. The Board said the following on this subject in Iberia Airlines of Spain (1988), 74 di 153; and 90 CLLC 16,048 (CLRB no. 700): ..."

(page 190)

In order to decide the questions at issue here, the Board took into consideration the general context in which the massive hiring of flight attendants took place in the spring of 1993 and the particular facts, where applicable, which the employer took into account in making its decision in certain specific cases. The Board does not have to determine whether the hiring process is in keeping with the generally accepted principles or whether the employer's decisions are justified, having regard to the candidates' qualifications. In short, it is not the Board's responsibility to determine whether the employer's actions constitute the appropriate administrative decision.

It is, however, the Board's responsibility to examine the context in which the questions concerning past union experience and the extension of the workday during the first flight worked at Air Transat were asked. In so doing, the Board must bear in mind that some complainants who played a more active role in the union were asked more specific questions on their union activities, their personal motivation and their interpretation of the labour dispute at Nationair.

The hiring process and the way in which it was generally applied in the instant case do not reveal, a priori, a breach of the right of association that is protected by the Code. An employer has the right to satisfy itself of candidates' qualifications and work experience, regardless of when they may have been acquired, including during a labour dispute. At the same time, an employer's interest in these union activities, in particular its interest in the reasons that led certain candidates to participate in union activities and in their personal opinion of a labour dispute, must be motivated by its

concern for the sound management of its business. In this area, there is little discretion, and the Board will not hesitate to apply strictly the provisions of the Code that guarantee the exercise of the right of association, without any hindrance or interference on the part of an employer.

In the present case, given the fact that massive hiring took place through a highly decentralized decision-making process, the evidence does not support a finding that Air Transat systematically refused to hire union activists, or that candidates' union activities were, in the majority of cases, a motive for refusing to hire them. For this reason, the Board, after examining the evidence, has decided to dismiss the complaints of Dominic Diafera, Nathalie Dussault, Camina Garcia-Lopez, Lucie Gervais, Normand Lessard, Ed Morte, Tony Pezzuto, Daniel Pinet, Samantha Rossetti, Peter Schaffer and Ahmed-Zacharie Seif. The Board concludes that the employer succeeded in proving that its reasons for not hiring these complainants had nothing to do with their past union activities.

The Board, however, has decided to allow the complaints of Marie-Claire Hayes, Dale Humphrey, Lawrence Huot and Joe Rosado, because the employer did not satisfy the Board, in accordance with section 98(4) of the Code, that its refusal to hire them was not motivated, at least incidentally, by the union activities and opinions of these complainants.

Marie-Claire Hayes

The reason given for not hiring Marie-Claire Hayes as a flight attendant was that she was overqualified for this position. This reason has not persuaded the Board that her past union activities, to which Mrs. Trudel paid particular attention and in which she showed a particular interest, did not influence the employer's decision. The refusal to hire Mrs. Hayes is especially difficult to explain because the exceptional and urgent situation in which the employer found itself should instead have been an incentive to

acquire the services of highly qualified persons like Mrs. Hayes whose experience is beyond question. This, moreover, is what it did in two other cases where former Nationair flight directors were hired without their superior qualifications being a handicap. The Board has concluded that, in the absence of a valid reason for refusing to employ Mrs. Hayes, the employer's decision must have been influenced to some extent by her union experience and participation in union activities while working for her former employer. Air Transat did not, in this case, succeed in reversing the onus of proof which the Code places on it.

Dale Humphrey

The reason Air Transat gave for not hiring Dale Humphrey was his negative attitude towards his former employer whom he openly criticized during his interview with Mrs. Trudel. The employer's decision must be assessed in the light of Mrs. Trudel's questions and Mr. Humphrey's answers regarding his union views and activities, his personal perception of the labour dispute at Nationair, his ability to work for a new employer after this difficult experience, and the reasons why the complainant chose to remain in the flight attendants' bargaining unit instead of seeking a higher position. In the Board's opinion, an employer who asks a candidate, who has served as a union representative, to express his opinion on a long and difficult labour dispute cannot then refuse to hire this candidate because he allegedly displayed negativism. Mrs. Trudel objected to his using the interview as a place "to vent his frustrations". This opinion is reinforced by the fact that this labour dispute occurred in a business operated by an employer whose labour relations had for a number of years been considered particularly difficult. In this regard, it is difficult to believe that Mrs. Trudel, given her past history and the publicity that attended this labour dispute, was unaware of these particular circumstances. For these reasons, the Board has decided to allow Mr. Humphrey's complaint.

Lawrence Huot and Joe Rosado

In the case of Lawrence Huot and Joe Rosado, the employer indicated that it did not hire these candidates because of the bad references it obtained from a former Nationair employee, Mrs. Lynn Burley. These references did not deal with either the qualifications or the professional competence of the employees, or their behaviour on the job. It was therefore on the strength of negative information dealing solely with the behaviour and actions of these complainants while they served as union representatives that the employer decided not to hire them. Air Transat did not succeed in persuading the Board that it decided not to hire these complainants for reasons other than their union activities. On the contrary, these union activities appear to be the only reason why they were not hired.

V

FOR THESE REASONS, the Board:

1. Dismisses the complaints of Dominic Diafera, Nathalie Dussault, Camina Garcia-Lopez, Lucie Gervais, Normand Lessard, Ed Morte, Tony Pezzuto, Daniel Pinet, Samantha Rossetti, Peter Schaffer and Ahmed-Zacharie Seif;
2. Allows the complaints of Marie-Claire Hayes, Dale Humphrey, Lawrence Huot and Joe Rosado;

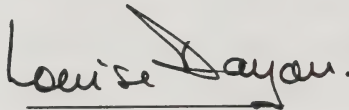
Orders the employer to hire Marie-Claire Hayes, Dale Humphrey, Lawrence Huot and Joe Rosado as flight attendants, with retroactive effect to the respective dates of their initial selection interviews;

Orders the employer to grant Marie-Claire Hayes, Dale Humphrey, Lawrence Huot and Joe Rosado, with retroactive effect to the above respective dates, all the rights and

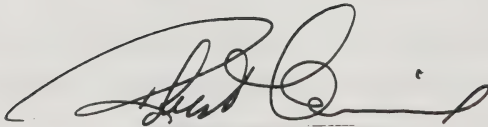
privileges they were denied as a result of the employer's refusal to hire them, in particular the seniority ranking and the pay to which they would have been entitled had they been in the employer's employ.

3. The Board takes note of the withdrawal of the complaint of Phillis Penchuck, which was filed at the hearing.

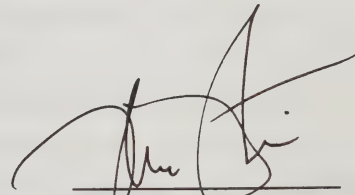
The Board designates Mrs. Suzanne Pichette, Regional Director of its Montréal regional office, to assist the parties in implementing the above orders. The Board reserves the right to settle any question that may arise from implementation of these orders.



Louise Doyon
Vice-Chair



Robert Cadieux
Member



François Bastien
Member

information

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Summary

General Teamsters Local Union No. 362, applicant, and D.H.L. International Express Ltd., employer.

Board File: 555-3791
CLRB/CCRT Decision no. 1101
December 23, 1994

Résumé

Section locale 362 du syndicat des Teamsters (General Teamsters), requérante, et D.H.L. International Express Ltd., employeur.

Dossier du Conseil: 555-3791
CLRB/CCRT Décision n° 1101
le 23 décembre 1994

The General Teamsters Local Union No. 362 filed an application to be certified as bargaining agent for a group of employees of D.H.L. International Express Ltd. in Calgary, Alberta.

In its response to the application, the employer raised the question as to whether the Board had constitutional jurisdiction to grant the order requested. It argued that insofar as the employer did not have a close operational relationship with any interprovincial undertaking, such as an airline or railway, the undertaking did not fall within federal jurisdiction.

The Board concluded that the business of D.H.L. Express International Ltd. extended beyond the provincial borders of Alberta and therefore did not require a close operational relationship with a physical interprovincial work, such as an airline or railway, to acquire its status as an interprovincial undertaking which falls within federal jurisdiction.

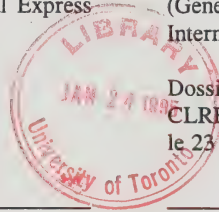
The application is granted.

La section locale 362 du syndicat des Teamsters (General Teamsters) a présenté une demande en vue d'être accréditée à l'égard d'un groupe d'employés de la compagnie D.H.L. International Express Ltd., à Calgary, en Alberta.

Dans sa réponse à la demande, l'employeur a soulevé la question de savoir si le Conseil avait la compétence constitutionnelle pour délivrer le certificat demandé. Il prétend que, dans la mesure où son entreprise n'a pas de lien fonctionnel étroit avec une entreprise interprovinciale, comme une société aérienne ou ferroviaire, elle ne relève de la compétence fédérale.

Le Conseil conclut que l'entreprise de l'employeur s'étend au-delà des frontières de la province de l'Alberta et n'a donc pas besoin d'un lien fonctionnel étroit avec une entreprise interprovinciale, comme une société aérienne ou ferroviaire, pour acquérir le statut d'entreprise interprovinciale relevant de la compétence fédérale.

Le Conseil fait droit à la demande.



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Reasons for decision

General Teamsters, Local Union No. 362,

applicant,

and

D.H.L. International Express Limited,

employer.

Board File: 555-3791

CLRB/CCRT Decision no. 1101

December 23, 1994

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Calvin B. Davis and Ms. Sarah E. FitzGerald, Members.

Appearances

Mr. Murray D. McGown, Q.C., for the applicant;

Mr. David J. Corry, for the employer.

The reasons for this decision were written by Mr. Richard I. Hornung, Q.C.

I

The applicant, General Teamsters Local Union no. 362 (the "union"), brings an application to be certified as the bargaining agent for a group of employees employed with DHL International Express Ltd. (hereinafter "DHL Canada" or the "Employer") in Calgary, Alberta.

In its response the Employer raised the question of the Board's constitutional jurisdiction to grant the order requested.

II

DHL International Express Ltd. has a network of 14 offices in Canada providing an express pick-up and delivery courier service and freight delivery operation. It directly owns and operates eight of these, including the Calgary operation. Six other operations are run under what is essentially a franchise agreement with local owners at each center. The eight Employer-owned depots are located in 8 major Canadian cities, namely, Halifax, Montreal, Ottawa, Toronto, Winnipeg, Edmonton, Calgary, and Vancouver.

Incorporated under the Canada Business Corporations Act, with head office in Mississauga, Ontario, the Employer is part of an international transportation network called "DHL Worldwide Express" (hereafter "DHL Worldwide") which operates other subsidiaries in several countries around the globe. DHL Worldwide is a wholly-owned subsidiary of Middletown, B.V., a parent company with registered offices in Amsterdam, Netherlands.

DHL's Canadian operation was established as part of the DHL International network through the terms of a written agreement with DHL Worldwide B.V.L. Amsterdam and the Employer. The agreement (Exhibit 4.1) provides that the Employer's "territory" shall mean "Canada". Some of the salient provisions of the agreement provide as follows (there the term "DHL" is used in the agreement, it refers to "DHL Worldwide". "DHL Canada", the employer, is referred to as "the Company"):

"WHEREAS:

(A) The Network (as hereafter defined) extends to cities situated in Europe, Africa, Asia, Australasia, the Middle East and South

America. DHL has the right and obligation to allow access to the Network to certain approved companies carrying on business as forwarders with the intent that the Network will be maintained in and extended to all major business centres throughout the world.

(B) The Company (the Employer) carries on business in Canada as a forwarder of all types of goods and is desirous of becoming part of the Network so as to offer to its existing and new customers a world wide delivery system.

(C) DHL is prepared to allow the Company access to the Network and to operate in accordance with the established practices of the Network.

...

'the Network' shall mean the international transportation network formed by the aggregate of companies around the world carrying on business under the style or name 'DHL' who offer to their customers an international document and small parcel delivery system and provide pick-up and delivery facilities similar to those described herein."

The agreement provides that the Employer's obligations shall include the following:

"2.1 THE COMPANY'S OBLIGATIONS

...

- (b) to provide an efficient and reliable outlet of the Network in the Territory and to this end receive Consignments arriving in the Territory check them against the manifest and deliver them to the premises of individual consignees against receipt;*
- (c) in the case of transportation from the Territory to destinations abroad through the Network, to collect consignments from the premises of individual consignors and to manifest the Consignments in accordance with the documentation and procedures stipulated by DHL prior to delivering all consignments to the airport or other designated point of despatch;*

- (d) *to invoice its customers in the Territory in accordance with the price and general conditions employed by the Network and advised by DHL from time to time, provided always that the Company may in accordance with its commercial judgement adjust the price stipulated by DHL in order to achieve additional sales or to reward customers of the Company who make extensive use of the Network;*

...

2.2 In the performance of its obligations contained in clause 2.1 hereof the Company further agrees and undertakes that it shall:

...

- (d) *use the name "DHL" and other identifying characteristics of the Network in substantially the same combination arrangement and manner as developed and displayed by the Network so that the Company's business will be readily recognizable by customers or potential customers as being part of the Network;"*

In return, DHL Worldwide's obligations include:

3. "DHL'S OBLIGATIONS"

3.1 In consideration of the performance by the Company of the obligations set out in Clause 2 hereof, DHL agrees and undertakes to allow the Company to become part of and have access to the Network and:

- (a) *to complete or to procure completion of the delivery of the Consignments collected by the Company in the Territory to their ultimate destinations outside the Territory supplying (if required and requested by the Company) a signed receipt from each consignee;*

...

- (c) *to bear all costs and risks in relation to each Consignment from the time it is delivered by the Company into the custody of an airline chosen by DHL until the time it is delivered to the ultimate consignee;"*

...

Finally, the contract makes provision for the manner in which the Employer is to pay DHL Worldwide pursuant to the contract.

4. PAYMENT FOR THE USE OF THE NETWORK

4.1 *The Company shall pay to DHL each month such sum as represents the difference between (a) its bills delivered to Customers in the Territory for the Service (net of Value Added Tax or any similar sales turnover or like taxes) and (b) the aggregate of _____ of Local Costs and _____ of the air transportation and other delivery costs between towns and cities inside the Territory.*

4.2 *In the event that _____ of Local Costs exceeds the Company's bills delivered (net of value added tax or any similar sales turnover or like taxes) then DHL shall pay to the Company such sum as represents the excess within 30 days of DHL agreeing the Company's computation of Local Costs."*

A network agreement similar to Exhibit 4.1, is signed by DHL Worldwide with other DHL International entities around the world, including the United States. Although the contractual bodies are different in the United States and in other countries around the world, they share a commonality in that they are all operationally attached to the Worldwide Network as referenced in the Network Agreement (Exhibit 4.1). In its advertising brochure, the company encourages business to choose it for its:

"... superior speed and reliability, including:

- *Next day service to the U.S. from virtually every Canadian destination*

- *Over 140 daily flights that connect DHL delivery points throughout Canada*
- *The world's largest international air express network*
- *Direct service between our Cincinnati SuperHub and Toronto, between Vancouver and Seattle, and from New York to Montreal and Toronto*
- *Door to door control of your shipments*
- *Saturday, Sunday and holiday service with prior arrangement*

Throughout Canada and the world, no other international air express service provides you with the dedicated personal service of DHL."

In Calgary, the Employer's employees pick up items for shipping from clients in the city and return them to the Calgary office. There, the items are sorted by destination for transfer and delivery. Any goods being shipped out of Calgary are transported, after being sorted, to the Calgary International Airport by the Employer's drivers. There, they are loaded on an independent commercial or charter airline and delivered to their destination. When the freight arrives at its destination, it is picked up by employees of another of the Employer's offices in Canada, or internationally, by employees of another DHL Worldwide corporate entity that has signed a network agreement similar to that contained in Exhibit 4.1. It is then delivered to the addressee by the DHL employees.

The same procedure is used in reverse for incoming freight to Calgary which originates out of Province or out of the country.

Over 90% of the freight handled by the Calgary office is either destined for, or arriving from, DHL Worldwide operations outside of Alberta. The majority of those are from locations outside of Canada.

This process of pick-up and delivery is coordinated through the Employer's head office in Mississauga, Ontario. Goods entering Canada, which originate from DHL Worldwide locations, enter either through Vancouver or Toronto and are then taken to Canadian transfer points by independent airlines and eventually delivered locally by DHL Canada employees.

The Employer, through its Mississauga office, has contracted with Air Canada (Exhibit 4.2), Canadian Airlines (Exhibit 4.3), and CanAir Cargo (Exhibit 4.4), to arrange for the carriage of its courier freight at all DHL locations in Canada. In addition, as indicated in the officer's report:

"... The Employer also has one (1) direct daily international route between Calgary and Seattle, Washington, for parcels destined for southern international locations. This route is a result of a 'Reserve Space Agreement' DHL has with United Parcel Service (hereinafter referred to as "UPS"), by which DHL rents a guaranteed block space on a UPS chartered aircraft which flies between Calgary and Seattle daily. DHL has no ownership or control in any of the Airlines with which it contracts. ..."

All vehicles used by the Employer in Canada (including Calgary) are leased under a national agreement negotiated by the Employer's head office in Mississauga, as is all vehicle insurance. In carrying out their duties, none of the Employer's Calgary employees leave the Province of Alberta, nor do any of the Employer's vehicles cross provincial or national lines.

Although the local Calgary management are authorized to offer discounts in order to attract clients in local market conditions, the rates charged for parcel courier at its Calgary offices are determined at the Employer's head office in Mississauga. Rates of pay and benefit packages for DHL operations differ at each Canadian location and are established after joint consultation between local management and head office in Mississauga.

Accounts receivable, accounts payable, payroll, and other accounting functions for the Employer in Calgary are done from the head office in Mississauga. This is true for all DHL operations throughout Canada. Costs related to Workers Compensation benefits coverage for the Calgary employees is administered in Calgary directly but premiums are paid from head office.

III

The constitutional authority of the Board to deal with labour relations is set out in the following provisions of the Canada Labour Code:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Section 2 of the Code defines "federal work, undertaking or business" as follows:

"'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

(d) a ferry between any province and any other province or between any province and any country other than Canada,

(e) aerodromes, aircraft or a line of air transportation,

(f) a radio broadcasting station,

(g) a bank,

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces."

Of particular relevance in this case is paragraph (b) of the above definition. This part of the definition reproduces almost verbatim the wording of section 92(10)(a) of the Constitution Act which provides:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,

...

10. Local Works and Undertakings other than such as are of the following Classes:-

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; ..."

Each province has constitutional jurisdiction to deal exclusively with labour relations of "Local Works and Undertakings" other than as are excepted by section 92(10)(a).

IV

The Employer contends that its operation in Calgary is a "Local Work or Undertaking" subject to exclusive provincial jurisdiction. Its argument is best capsulized in its brief submitted to the Board dated August 19, 1994:

"DHL transports freight and packages to other Canadian and worldwide destinations. However, focusing on the branch operations, all of DHL's local undertakings are wholly independent of the inter-provincial and international undertaking, namely the airline companies, which actually transport the parcels, packages and freight across provincial and international boundaries. In this respect DHL is nothing other than a shipper which provides a service by contract of inter-provincial and international transportation, and then coordinates with other members of the DHL Worldwide Express network regarding the delivery of goods to other destinations and from other destinations to Calgary. The actual movement of these goods, however, is completely subcontracted to independent commercial and charter airlines with no relationship to DHL or its parent corporation.

Re Cannet Freight Carnage Limited (1975), 60 D.L.R. (3d) 473 (F.C.A.) (Tab 7)

Re The Queen and Cottrell Forwarding Limited (1981), 124 D.L.R. (3d) 674 (Ont. H.C.) (Tab 8)"

We disagree with the Employer's contention that the focus should be on the "branch operations". As the analysis which follows shows, the focus must be on the "undertaking" itself. In this case, as in Emery Worldwide (1989), 79 di 71; and 7 CLRBR (2d) 49 (CLRB no. 768), and Brink's Canada Limited (1992), 87 di 65; and

16 CLRB (2d) 132 (CLRB no. 918), we conclude that the undertaking comprises DHL's entire Canadian operation, namely: DHL International Express Ltd.

V

In Brink's Canada Limited, supra, the Board recently reviewed the relevant jurisprudence and observed:

"The determination whether any work, undertaking or business is excepted from provincial jurisdiction depends on whether, on the facts of each case, it is a work or undertaking connecting the province with another or extends beyond the boundaries of the province. As the Privy Council stated in Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657:

'... The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is interprovincial. Just as the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case so the question whether it is a camouflaged local undertaking masquerading as an inter-connecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an Act or Regulation.'

(page 680)

In determining whether a work or undertaking is interprovincial the authorities have looked at whether the extra-provincial operations of the work or undertaking are carried on on a "regular and continuous" basis. Extra-provincial operations carried on on a casual or exceptional basis will not be sufficient to classify an otherwise local work or undertaking as interprovincial and thus escape from provincial jurisdiction. See Winner, supra; Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLC 14,211; Northern Telecom Canada Limited v. Communications Workers of Canada et al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R.

(3d) 1; and 83 CLLC 14,048; Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd., [1965] 1 O.R. 84; and (1964), 46 D.L.R. (2d) 700, (H.C.J.); Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd., [1960] O.R. 497; and (1960), 25 D.L.R. (2d) 161 (H.C.J.); and Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al. (1983), 44 O.R. (2d) 560; and 84 CLLC 14,006 (C.A.)."

...

(pages 70-73; and 137-138)

VI

It is the "pith and substance" of the work or undertaking as a whole that must be considered in determining whether or not it is interprovincial within the meaning of the Code and the Constitution of Canada; (see Winner, supra at page 582).

As discussed by Professor P.W. Hogg in Constitutional Law of Canada, (3rd. ed., Vol. 1; Scarborough, Carswell):

"...According to s. 92(10)(a), an undertaking in a province is within federal jurisdiction if it is an undertaking 'connecting the province with any other or others of the provinces, or extending beyond the limits of the province'. The courts have held that the connection (or extension) that is contemplated by s. 92(10)(a) is an operational connection, and not a merely physical connection...An undertaking will come within s. 92(10)(a) only if (1) the undertaking's own business operations extend beyond the provincial border, or (2) the undertaking has a close operational relationship with an interprovincial undertaking."

(pages 22-5 & 22-6; emphasis added)

An interprovincial organization, to be a federal undertaking, must have the requisite dominant purpose of "...connecting the Province with...others of the provinces or

extending beyond the limits of the Province". Hogg contends (at page 22-5) that this phrase from the constitution must be read *ejusdem generis* with the specific examples which precede it. This means, in his words, that the word "connecting" in this context "should be confined to connections by transportation or communication". An enterprise or organization engaged in transportation or communication with the requisite dominant interprovincial and/or international purpose will be, in and of itself, within federal jurisdiction.

If such an undertaking's business operations extend beyond the borders of the province, it does not require a close operational relationship with a physical interprovincial work, such as an airline or railway, to acquire its status as an interprovincial undertaking falling within federal jurisdiction.

The Board, in Emery Worldwide (1989), 79 di 71; and 7 CLRBR (2d) 49 (CLRBR no. 768), alludes to this fact when it states:

"The simple answer in this case is that Emery's operations in Canada form one unseverable core federal undertaking. The principles in Northern Telecom, supra, simply have no application when one is dealing with one indivisible undertaking. As long as Emery itself operates the British Columbia office, it will form a part of Emery's core federal undertaking.

Why is Emery federal? Emery operates a core federal undertaking by virtue of its regular and continuous connections with the United States. The daily flights from Dayton, Ohio, to Toronto, Montreal and Ottawa, for example, are sufficient to render Emery Worldwide a core federal undertaking in Canada. All its related regional offices are also within federal jurisdiction even though, if they were operated by a third party, such operations might be wholly provincial. This is not a situation where Emery's regional offices in Canada operate separate and distinct undertakings such that the reasoning found in Canadian Pacific Railway Co. v. A.G.B.C., [1950] A.C. 122 (P.C.) would apply. All of Emery's offices combine to form one indivisible undertaking."

(pages 74 and 52)

Although reference is made to the regular and continuous connection to the United States, the same conclusion could have been reached on the facts even if the Emery had not owned its own aircraft. In Emery (supra) the Board simply concluded that "...the daily flights from Dayton, Ohio, to Toronto, Montreal and Ottawa, for example, are sufficient to render Emery Worldwide a core federal undertaking", (emphasis added).

In Brink's, supra, the Board, in its conclusion, expanded on this concept:

"Brinks's Canada Limited holds itself out to the public as a network for the secure transportation of valuables on a world-wide basis. It has obtained the licences and permits necessary to establish the legal basis to put its public promises into effect.

In BCL's ground operations, valuables are transported in armoured vehicles in accordance with standard procedures and regulations established by its world headquarters. The ground operations and the air transport operations are centrally co-ordinated elements of the overall Brink's transportation network.

BCL does not own any aircraft for its air transportation operations. However, it uses some chartered aircrafts which are under its control and on non-charter flights, a Brink's air courier employee accompanies and guards each shipment. BCL is not simply an ordinary shipper on the airline as the freight forwarders were on CN Rail in the Cannet and Cottrell cases, supra.

BCL's Calgary operations, taken in isolation, would certainly constitute an interprovincial transportation undertaking solely on the basis of the regular and continuous trips made by its armoured cars to points in British Columbia. The evidence before the Board, however, shows that the Calgary branch office, all other branch offices, the regional offices, the special operations (air operation, tractor trailer operation), and the Canadian head office are all integrated components of the much bigger network which is the whole of BCL. Unlike the scant evidence in the Brink's decision, supra, the evidence presented to the Board in this case clearly establishes that the entire Canadian operation of Brink's Canada Limited is an indivisible interprovincial and international undertaking."

(pages 73-74; and 140-141; emphasis added)

Although evidence of regular and continuous trips across provincial lines, by the undertaking itself, would suffice to bring the operation into the federal sphere, evidence that the undertaking has as its dominant purpose an interprovincial or international operational connection extending its activities - services to its clients - "beyond the limits of the province", on a regular and continuous basis, is likewise sufficient to determine federal jurisdiction.

In Ryder Truck Lines, [1984] OLRB April Rep. 649, the Ontario Labour Relations Board dealt with a similar situation. A complaint had been brought by an employee against Ryder/P.I.E. Nationwide Inc. ("Ryder U.S."). Ryder Canada was operated as a division of Ryder U.S. Both Ryder companies were engaged in the transport business. Ninety percent (90%) of the loads carried by Ryder Canada were destined for or originated from points in the United States. Although Ryder Canada drivers and their trucks always remained within the borders of Ontario, they would deliver their trailers to a point near the Ontario/U.S. border where they would be picked up and transported into the United States by Ryder U.S. drivers. The same process operated in reverse for goods destined for Canada. In each case Ryder U.S. drivers transported the goods across the border. The OLRB concluded:

"... The fact that tractors and employees of Ryder Canada may always remain in Ontario does not preclude the labour relations of that company from falling within federal jurisdiction. Ryder Canada hauls trailers which have crossed or are about to cross international boundaries. It does so as a functionally integrated part of the Ryder undertaking, of which Ryder Canada and Ryder U.S. are interdependent and operationally connected components. If that undertaking were conducted by one corporation, there would be no question that its labour relations with employees in Canada would be governed by federal legislation. The fact that there are two distinct corporations involved in the undertaking does not lead to a different result. ..."

VII

As in Brinks Canada Limited, *supra*, and Emery Worldwide, *supra*, the employer here also relies upon the "freight forwarder" cases, *Cannet* and *Cottrell*. In Brinks's Canada Limited, *supra*, the Board capsulized its earlier analysis of these two decisions:

In Emery Worldwide (1989), 79 di 71; and 7 CLRBR (2d) 49 (CLRB no. 768), this Board dealt with a company engaged in freight forwarding on a world-wide basis. Its U.S. network utilized 55 company-owned aircraft to transport freight and packages to world-wide destinations. Its Canadian operations were similar but used third-party subcontractors to carry out interprovincial transport. At the hearing, Emery Worldwide claimed that it was simply a freight forwarder and thus outside this Board's jurisdiction. It relied on the "freight forwarding" cases, *In Re Cannet Freight Ltd.*, [1976] 1 F.C. 174; (1975), 60 D.L.R. (3d) 473; and 11 N.R. 606 (C.A.) (hereinafter *Cannet*), and *Re The Queen and Cottrell Forwarding Co.* (1981), 33 O.R. (2d) 486; and 124 D.L.R. (3d) 674 (Div. Ct.) (hereinafter *Cottrell*) to support its position.

In these two freight forwarding cases, the Court held that otherwise local undertakings which use a separate and distinct interprovincial undertaking (CN Rail) to ship freight across provincial boundaries do not thereby become interprovincial undertakings and do not fall within federal jurisdiction. The judgment of Steele, J., for the Court in Cottrell illustrates the reasoning of the Courts on both cases:

'... The railway company is the only body carrying on the interprovincial undertaking and it has the physical works as well. Clearly, if an individual customer of Cottrell wished to ship goods to the west, it would contract with the railway company to ship such goods. The mere fact that by contract Cottrell agrees with that individual customer to enter into the contract with the railway company and become the shipper itself, does not make Cottrell anything other than a shipper. The shipment is merely part of an over-all contract and a person who has no tangible or physical property under its control to operate an undertaking cannot, by contract, make himself a person carrying on an undertaking within the meaning of s. 92(10)(a) of the British North America Act, 1867. Cottrell is not carrying on an undertaking or operation but is merely providing a service by contract. To hold

otherwise would mean that any travel broker or other person engaged in general commerce could, by contract, provide interprovincial undertakings, even though he had no facilities whatsoever, and thereby claim that he was not subject to provincial jurisdiction. ...'

(pages 492; and 679-680)

The Board in Emery, supra, distinguished Cannet and Cottrell on the basis that in both Cannet and Cottrell, the local undertakings were wholly independent of the interprovincial undertaking, CN Rail. In Emery, supra, the regional operations were found to be part of Emery Worldwide which was a federal undertaking on the basis of daily flights from Dayton, Ohio, to Toronto, Montréal and Ottawa. The Board's decision in Emery, supra, was upheld by the Federal Court of Appeal."

In our view the factual situations in Cannet and Cottrell, supra, are equally distinguishable, as they were in Emery and Brink's, from the ones before us. In Cannet, the Chief Justice found that the Board erred "on the evidence before it in [that] case" when it concluded that Cannet's operations were within federal jurisdiction (p. 475 D.L.R.). Cannet's operation consisted of the carriage of goods in and around metropolitan Toronto and the coordination of other companies to pick up freight in Ontario. It then organized the delivery of those goods to docks for on-loading to C.N.R. rail cars. The C.N.R. then shipped most of these goods to Western Canada. Unlike the present case, Cannet's responsibility ended when the goods were loaded on the rail cars. And, unlike the present case, Cannet's "dominant purpose" was not the connection of forwarding and sorting as part of a broader network of such locations outside the province and country.

In Cottrell, the company was also engaged in the arrangement and coordination of the shipment of goods and entered into a series of contracts with others to actually transport the goods. Although mentioned, there was no analysis of the importance of Cottrell's related service in Western Canada through which shipments sent by CN Rail were delivered by drivers of a subsidiary company as well as independent drivers.

Neither was there discussion regarding the office or facilities which comprised the western operation. It appears that the decision did not turn on any analysis or consideration of these points. The Court's determination appears to be based solely on the fact that Cottrell was wholly independent of the interprovincial undertaking, which was CN Rail. Although not essential for our purposes, it nevertheless should be observed that the DHL network, in this case, provides, at each transportation stage, the interdependent and interconnected "facilities" that, according to Steele, J., were lacking in Cottrell, supra (page 492), in order to bring it within federal competence.

VIII

A fundamental principle to be taken from Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115; and [1979] 28 N.R. 107 (Northern Telecom #1) is that there is a need for "constitutional facts" upon which to decide constitutional jurisdiction.

Here, the entire DHL operation originated as a "group" or "system" of homogeneous offices, throughout Canada, with headquarters in Mississauga, Ontario. The services provided by each office of DHL Canada are equally homogeneous and interdependent on the national and international organization for their operation.

The Calgary location of DHL is wholly owned by DHL International Express Ltd. (DHL Canada) with head office in Mississauga. As indicated, 90% of the material consigned to the Calgary office is destined for or arriving from DHL Worldwide offices outside of Alberta. With minor exceptions, all of the DHL Canada locations throughout the country are essentially controlled from the head office.

DHL Canada in Mississauga maintains a reserved space agreement with UPS to ensure that its parcels will be carried daily from Calgary to Seattle, Washington, U.S.A.

All air flight contracts and all vehicle lease contracts, are made for all Canadian locations by the national office in Mississauga.

The Employer in this case, is a nation-wide operation that is part of a world-wide undertaking to transport goods and information. DHL takes custody of the customer's consignments "from the premises of individual consignors" to "the ultimate consignee" and "bear(s) all costs and risks" in relation to doing so, (see: EX. 4.1). By virtue of the agreement, DHL Worldwide, through the Employer, retains responsibility for the parcels even after the local offices, such as the Calgary operation, deliver the parcels to the airlines (see: paragraph 3.1(c) of Exhibit 4.1). DHL's Canada's network of contractual arrangements with local Canadian offices is far more than the mere "coordination" of the interprovincial transportation of its customers' goods. Although the Employer may use other carriers to perform the carriage of the goods, DHL Worldwide, (through its contractual relationship with DHL Canada) ultimately retains the burden of responsibility for the delivery of goods interprovincially and internationally at each transportation stage. That makes the undertaking something more than a series of contracts with individual carriers.

The Calgary operation, taken together with the Employer's other regional offices around the country; its reserved space agreement with UPS to transfer the Employer's parcels to and from the United States on a daily basis; its similar arrangements to carry its freight between provincial DHL points via commercial airlines; its operational connection with a single head office in Mississauga, Ontario; and, DHL Worldwide's ultimate responsibility for delivery at each transportation stage; are all part of the integrated and indivisible undertaking that is DHL Canada.

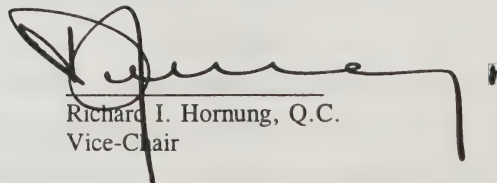
This undertaking is an integrated component of a much larger international network which is the whole of the operation known as DHL Worldwide. The D.H.L. Worldwide "network" comprises an "...aggregate of companies around the world carrying on business under the style or name 'D.H.L.'...", (Exhibit 4.1).

The Calgary office of the employer is part of the indivisible undertaking of DHL Canada and the latter is an interdependent and operationally integrated component of DHL Worldwide.

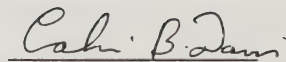
The core undertaking of the employer is to provide an interprovincial and international goods and document delivery service as part of an integrated and interdependent national and international transportation network formed by the aggregate of companies, in Canada and around the world, that carry on business as part of DHL Worldwide.

An analysis of the employer's activities leads us to conclude that DHL's operation in Canada has as its dominant purpose an interprovincial or international operational connection requiring the extension of its activities - services to its clients - "...beyond the limits of the province" on a regular and continuous basis. In "pith and substance", DHL Canada forms one unseverable core federal undertaking "...connecting the Province with ... others of the provinces or extending beyond the limits of the Province" and, therefore, falls within the Board's jurisdiction.

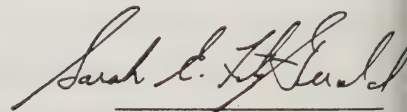
A Board order will issue accordingly.



Richard I. Hornung, Q.C.
Vice-Chair



Calvin B. Davis
Member



Sarah E. Fitzgerald
Member

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Summary

Canadian Union of Public Employees,
Broadcast Division, *complainant*, and
Canadian Broadcasting Corporation,
respondent.

Board File: 745-4575
CLRB/CCRT Decision no. 1102
December 23, 1994

Résumé

Syndicat canadien de la Fonction publique,
Division de radio-télévision, *plaignant*, et
Société Radio-Canada, *employeur*.

Dossier du Conseil: 745-4575
CLRB/CCRT Décision n° 1102
le 23 décembre 1994

The union alleges that the employer, by implementing an employee participation program known as "Opportunities for Change" without involving the union, breached sections 50, 94 and 96 of the Canada Labour Code.

Le syndicat allègue que l'employeur, en mettant en oeuvre un programme de participation des employés (possibilités de changement), sans consulter le syndicat, a enfreint les articles 50, 94 et 96 du Code canadien du travail.

The employer instituted a program called "Opportunities for Change" establishing a process to obtain comments and directions from individual employees with respect to operational changes which it proposed to make at the workplace. The program and its direct employee consultation process was designed and implemented by the employer without consultation or input from the union itself.

L'employeur a instauré le programme susmentionné qui établit le processus en vue d'obtenir les commentaires et points de vue des employés en ce qui a trait aux changements opérationnels qu'il entendait apporter dans le milieu de travail. Le programme et le processus de consultation directe avec les employés ont été conçus et mis en oeuvre par l'employeur qui n'a ni consulté le syndicat ni cherché à obtenir sa participation.



The Board found that the employer's program addressed issues that were currently on the bargaining table or were otherwise enshrined within the collective agreement itself.

To ensure that a consultative process does not offend the provisions of the Code, an employer must ensure that its implementation does not serve to subvert, circumvent, or replace the union in its legitimate role as exclusive bargaining agent, or otherwise interfere with the administration of the trade union or its representation of the employees.

The Board concluded that the employer's establishment and implementation of a process which directly affected collective bargaining and collective agreement issues without consultation or input from the union had the effect of undermining the union as the exclusive bargaining representative for the employees and, therefore, constituted a breach of sections 50 and 94(1)(a) of the Code.

Le Conseil juge que le programme de l'employeur porte sur des questions qui font l'objet de discussions à la table de négociation collective ou qui sont ancrées dans la convention collective.

Pour s'assurer qu'un processus de consultation n'enfreint pas les dispositions du Code, l'employeur doit veiller à ce que la mise en oeuvre du processus ne renverse ou ne remplace pas le rôle légitime d'agent négociateur exclusif du syndicat, ou n'y porte atteinte, ou ne constitue pas une ingérence dans l'administration d'un syndicat ou la représentation des employés.

Le Conseil conclut que le processus établi et mis en oeuvre par l'employeur sans que le dernier ait consulté le syndicat ou tenté d'obtenir sa participation influe directement sur le processus de négociation collective et sur les questions liées à la convention collective et affaiblit le syndicat en sa qualité d'agent négociateur exclusif des employés. Par conséquent, le Conseil juge qu'il s'agit d'une violation de l'article 50 et de l'alinéa 94(1)a) du Code.

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Reasons for decision

Canadian Union of Public Employees,
Broadcast Division,

complainant,

and

Canadian Broadcasting Corporation,

respondent.

Board File: 745-4575
CLRB/CCRT Decision no. 1102
December 23, 1994

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Michael Eayrs and Ms. Mary Rozenberg, Members.

Appearances

Ms. Cynthia D. Watson, for the complainant; and

Mr. Guy Dufort and Ms. Suzanne Thibaudeau, Q.C., for the respondent.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

On July 25, 1993, the union, the Canadian Union of Public Employees (CUPE), filed a complaint with the Board alleging that the employer, the Canadian Broadcasting Corporation (CBC), by implementing the "Opportunities for Change" program which provided for direct consultation by the employer with employee members of the Union on issues that were the subject of bargaining negotiations or were otherwise enshrined in the collective agreement between the parties, breached sections 50, 94 and 96 of the Canada Labour Code.

II

The applicable sections of the Code read as follows:

"36. (1) Where a trade union is certified as the bargaining agent for a bargaining unit,

(a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;

...

50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; and

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

...

94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

III

Although the Board heard protracted evidence, the facts and circumstances surrounding the issues that are critical to our determination are essentially straightforward and in negligible dispute.

In 1991, the employer's management personnel concluded that dramatic technological changes were coming to the broadcasting industry generally, along with equally dramatic financial changes to the CBC's funding that would affect it specifically. The recent restructuring of the bargaining units at CBC, by the Board, gave it - it believed - a window of opportunity to make crucial, if not drastic, changes to cope with the impending challenges of competitive broadcasting and its future financial constraints.

In October 1991, to meet this challenge, the employer's internal management embarked upon a program (see inter alia Exhibits 83-87) that was intended to provide a new operating framework for the CBC. The program, eventually given the epithet of "Opportunities for Change" (hereafter "OFC"), was designed to involve direct consultation and discussion with CBC's in and out of scope employees across the country.

The OFC program was unveiled at a meeting with the union's executive and its members in Toronto on May 12, 1993. This was the first official notice the union had of the OFC's existence or of the process it would employ.

At the meeting the participants were provided with a document entitled "Starting from Basic Principles" (Exhibit 12), which summarized the corporate goals and

guiding principles on which the employer's reorganization was to be based and on which the employer sought input from its employees through the OFC process.

The document provides as follows:

"Starting From Basic Principles

1. Broad Job Categories

- *Job categories will be broadly defined. This will result in more varied, interesting and rewarding work.*

2. Jobs Defined by Function

- *Jobs will be defined by function rather than in terms of equipment or organizational structure.*

3. Convergence of Technical, Production and On-Air Functions

- *Radio and television production requires both generalists and specialists in both craft and program areas. Some functions may be performed by personnel from more than one bargaining unit.*

4. More Training

- *The Corporation's Investment in training, and in developing the skills of its people, will be increased. This will enhance career opportunities for employees.*

5. A More Flexible Approach To Compensation

- *CBC will maintain basic national pay rates, but with enough flexibility to recognize the range of employees from entry level through to highly skilled and specialized.*

6. Self-Assignment

- *The principle of self-assignment should be extended.*

7. *Production: In-House + Co-production + Independent*

- *CBC will continue both in-house production and acquisition from independent producers.*

8. *Staffing to Meet Operational Requirements*

- *Staffing needs, mixes and assignments should be determined on the basis of the skills required to meet production and operational demand."*

9. *Sharing Resources With Co-Producers*

- *A production-oriented environment will facilitate the amalgamation of resources among CBC and other producers.*

10. *Complaint Resolution*

- *The process for hearing and resolving complaints should be simplified."*

Attached was a further document entitled "The Process," which schematically diagrammed how the program would work.

The schematic illustrates that no provision was made by the employer, at any stage in OFC process, for union participation. Immediately following the Toronto meeting, the union expressed concerns about that fact. It also voiced concern that the process sought direct employee input and communication with the employer about items that would, if implemented, require changes in the collective agreement between the parties or, in fact, were issues that were currently on the bargaining table.

In order to accommodate the union's concerns, the employer agreed that, after it gathered all the information from the employees it required, and after all of the

meetings were held and the proposals were documented and processed, it would meet with the union to discuss the findings of the OFC program. In fact, following the Toronto meeting, in a letter dated May 14, 1993, CBC revised the original schematic of the "Process" (Exhibit 12) to include "Presentation to Union Leaders" at the commencement of the process and "Management/Union Joint Review" of the results collected at its conclusion (Exhibit 32). Although included in the new schematic, the actual process never involved the union in the fashion described. No other accommodations or concessions were made by the CBC to address the union's concerns or involve the union directly in the process.

Following its presentation in Toronto, the OFC "road show," as it was labelled at the hearing, was presented relatively intact to CBC employees across the country.

In order to ensure the employee participation sought, the employer established a program it called "Leaders of Change." By this process, the employer unilaterally selected various individuals in its organization - including management, union members, and in some cases union representatives who were designated the "Leaders of Change" - to attend and participate in "training" workshops organized by the employer across the country. These groups met and were addressed by a management team that outlined the problems the CBC both presently faced and foresaw in the future. They discussed the employer's proposals for change and "brainstormed" with respect to other existing problems or ideas they had for reform and restructure of the CBC.

These Leaders of Change were provided with various documents to assist them in carrying out their mandate, including a "Discussion Paper for Consultation" (Exhibit 7) which expanded on the 10 Basic Principles, enlarged upon the employer's objectives for the program and provided instructional guidelines "... to guide the consultative process." In addition, they were instructed by individuals from the

Niagara Institute on how to encourage and obtain input from their fellow employees at all levels of the operation.

These Leaders of Change, after they returned to their workplace and obtained input from their fellow employees as instructed, submitted their comments to the Leaders of Change operatives who were essentially management personnel. At this point, the employer would assimilate the comments, analyze the results and map out a process to implement the necessary changes. Hence, these Leaders of Change were invited not only to express their personal views on a wide array of issues that affect the employer and union members, but also to solicit the views of members across the country and make those views known, through the Leaders of Change process, to the employer.

The OFC program, its process, its direction, and its topics of discussion, as well as a selection of those members who would be involved as Leaders of Change, were all done exclusively by the employer without any direct, or indirect, input from the union. In fact, the union's attempts to become involved after the program was implemented were rebuffed by the employer.

During the time that the OFC process was inaugurated, and while the Leaders of Change process was being carried out, the union and employer were involved in collective bargaining for a contract to cover the May 1992 to May 1993 period. An agreement was eventually reached in September 1993.

IV

Although an employer is entitled to discuss matters that concern the operation of the workplace with employees, it is not entitled to bargain directly with them.

The general principles governing direct employer's communications with its employees were elaborated at length in Sedpex Inc. (1988), 72 di 148 (CLRB no. 667):

"Generally speaking the following principles apply to employer communications:

-an employer may reply to what he perceives as propaganda, but he may not use promises of reward, intimidation threats or other means of coercion to interfere with, undermine or derogate the union;

-he may not threaten unpleasant consequences if something is done or not done by a union;

-he may not make inappropriate selling pitches to employees over the head of the union;

-the employer is in the clear if he does not provide misleading information calculated to damage, or having the effect of damaging, the bargaining agent in the eyes of the people in the unit.

In short, if an employer speaks the truth, and does so moderately and rationally, exercising appropriate recognition of the legitimacy and role of the bargaining agent, the communication will probably be judged to be within the realm of permissibility. Where the communication does not distort the truth or mislead, sets out a reasonably fair and accurate summary of the situation, does not denigrate the union or have the purpose and effect of undermining its efforts to represent its people, it can be considered to be outside the prohibition of section 184(1)(a)."

(pages 159-160; emphasis added)

The Ontario Labour Relations Board examined these rules in the context of the collective bargaining process:

"The existence of this well-established principle of exclusivity of bargaining right means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these

communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 of the Act, prohibiting employer interference with the formation, selection of a trade union or the representation of employees by a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not 'deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence'. Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent."

(A.N. Shaw Restoration Ltd., [1978] 2 Can LRBR 214 (Ont.), at page 219; emphasis added; see also AAF-Ltd., Decision No. 318/85, November 8, 1985 (BCLRB), and Perimeter Transportation Limited, Decision no. C190/90, October 4, 1990 (BCIRC))

In Plaza Fiberglas Manufacturing Limited et al. (1990), 6 CLRBR (2d) 174, the Ontario Labour Relations Board held that an employer's attempt to negotiate directly with its employees contravened the duty to bargain in good faith and also constituted unlawful interference with the union's exclusive right to represent employees of the bargaining unit:

"The duty to bargain exclusively with the union continues after the lockout. Direct bargaining with the employees in the bargaining unit is one further element in the employer's bargaining in bad faith under s. 15 of the Act. Such direct bargaining is indicative of the employer's refusal to satisfy its obligation to recognize the Steelworkers as the exclusive bargaining agent of the employees. Bargaining outside the contours of the appropriate

bargaining relationship militates against the parties being able to achieve a collective agreement in an atmosphere marked by good faith as required by the Act. While I do not conclude that the treatment of union members or supporters was different from the treatment of non-members or those opposed to the union (despite the apparent failure to hire two union supporters who applied for jobs at Citicor), the effect of the direct bargaining is to give the employees the impression that they cannot depend on the union and that the employer does not believe it needs to negotiate with the union to achieve its aims. As such, it also contravenes s. 64 of the Act."

(pages 194-195; emphasis added; see also to the same effect Radio Shack, [1980] 1 Can LRBR 99 (Ont.))

(Note: Section 64 of the Ontario legislation is similar to section 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations).)

As both sections 94(1)(a) and 50 of the Code are aimed, among other things, at protecting the viability of the union and its role of exclusive bargaining agent entrenched in section 36(1)(a), (Yukon Freight Lines Limited (1988), 75 di 164 (CLRB no. 715), page 183; and Canada Post Corporation (1985), 63 di 136 (CLRB no. 544), page 154), an employer's direct communications with its employees, while collective bargaining is in progress, that undermines or discredits the union in the eyes of the employees effectively contravenes both sections of the Code.

V

There is no need to delve into the details of the items bargained or the bargaining process itself. A review of the documents - in particular the contents of Exhibits 7, 12, 23-27, 50, 66, 74 and 75 - in the context of the evidence adduced, convinces us that the employer, through the OFC process, invited direct input from unionized employees on matters that were either clearly enshrined in the collective agreement

or were directly related to issues which, at the time, were being bargained with the union in the collective bargaining process.

Without being exhaustive, the OFC program (see Basic Principles, Exhibit 12, as fleshed out in the Discussion Paper, Exhibit 7) directly addressed the following matters, taken from the parties' formal bargaining proposals, that were being collectively bargained at the time:

Exhibit 23:

- Industrial relations dignity;
- Lifestyle benefits;
- Career development;
- Contract administration;

Exhibit 24:

- Wages and benefits;
- Job security and jurisdiction;
- Lifestyle benefit;
- Career development;
- Contract administration

Exhibit 26:

- Use of temporary employees;
- Letter of Understanding: New challenges in the future.

A review of the confidential employer documents that deal with the establishment of the OFC process (see Exhibits 83-87) clearly illustrates that, when it instituted the program, the employer intended to communicate directly with employees regarding matters it knew would require changes to the collective agreement, and would be bargained with the union in the next negotiating round. For example, Exhibit 87, "Seizing The Moment," which became the basis for the eventually named "Opportunity For Change" process, includes the following statements:

"STRATEGIC CONSIDERATIONS

...

Communication

- *There is an immediate requirement for a communications strategy.*
- *It should begin with clear statements of values and missions directed at our employees and resonate with the root values of our business.*
- ...
- *Broad consultation with employees to solicit their input and buy-in to the Corporate mission and goals must be an integral part of the strategy.*
- *The primary focus for the communication is the employees. Their unions require attention as well, but **the strategy must recognize that unions are not safe conduits for messages from management to its employees.***

Key Issues

Seizing the Moment proposes to:

- *Devalue seniority for a significant portion of the workplace.*
- *Eliminate overtime and penalty provisions which many employees perceive as regular income.*
- *Eliminate individual job security currently enjoyed by a significant portion of the workforce."*

(pages 29-30; emphasis added)

Exhibit 87 was prepared for CBC's senior management. The employer's Director of Human Resource Strategy, in referring to it, candidly admitted that the items dealing

with compensation (page 15), job evaluation (page 17), selection, employment and termination (page 21), training and development (page 25), and employment security (page 26) all deal with issues that are contained in the collective agreement and therefore needed to be directly negotiated with the union.

In addition, one need only cursorily examine the voluminous contents of Exhibit 94 - the 700-page compilation of employees' comments from across the country with respect to the issues dealt with in the OFC program - to conclude that through the process employees formed conclusions and provided opinions to the employer regarding the union's organization and representation of its members, collective bargaining issues and matters concerning the latest negotiations.

We have no doubt that the employer knowingly included items in the OFC program that were designed to elicit comments and information from rank and file employees with respect to issues that required direct discussion with the union as their exclusive bargaining representative. We are satisfied as well, as demonstrated by the emphasized portion of Exhibit 87 above, that the employer implemented the program in the fashion it did, at least in part, to circumvent the requisite direct discussion with the union.

Considering the fact that the employer and the union were involved in collective bargaining, and that major issues discussed with employees in the OFC process related to items that were either on the bargaining table or contained in the collective agreement, we conclude that the employer's conduct could only undermine the union in the eyes of its members and have an adverse effect both on the administration of the trade union and its representation as the exclusive bargaining agent of unionized employees. The employer's conduct therefore constituted a clear breach of both sections 94(1)(a) and 50 of the Code.

VI

The establishment of a process by an employer to encourage and include union and employee participation in its management decisions with respect to required changes at the workplace is to be encouraged at every turn. These programs are often referred to as "Employee Involvement," "Employee Participation" or "Quality of Working Life" programs. These programs are designed to improve not only the employer's operating and competitive abilities but also facilitate the advancement of the employees' monetary, psychological and job security interests. (See M.R. Kelley and B. Harrison, "Unions, Technology, and Labor-Management Cooperation", and A.E. Eaton and P.B. Voos, "Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation" in Unions and Economic Competitiveness, Economic Policy Institute (New York: L. Mishel and P.B. Voos Editors, 1992), at pages 247 and 173 respectively.)

It is becoming increasingly apparent that sound labour-management relations in the current economic and social circumstances are no longer best served by an adversarial approach to industrial relations. In order to serve the laudable objectives of the Code in the current social and economic marketplace, both sides of the collective bargaining equation must possess and exhibit, through their actions, an understanding that today's market place, replete with shifts in production technologies and increasing competition, calls for a re-evaluation of the traditional labour/management framework. In short, a more collaborative approach, as advocated by labour observers, is necessary.

Professor Paul C. Weiler describes as follows this approach of employee participation in an employer's business, the different forms it might take in an organization and its advantages:

"For the last decade an ever-increasing number of businesses have been devising innovative programs of direct worker participation. The aim of such programs is to give employees a substantial measure of involvement in the affairs of the enterprise, but in a format that is sensitive to the immediate circumstances of each plant and firm, and that will be flexible in altering course as these circumstances change.

... Taken together, these recent developments imply that the emphasis of labor policy should shift from merely protecting employees from the harmful things that employers may do to them (and vice-versa) in an assumedly adversarial relationship, to encouraging active participation by both sides in an effort to produce greater mutual benefits for each in an ideally cooperative relationship. Our priority ought to be devise arrangements which will enable the firm to tap the insights and ingenuity of the work force in improving the efficiency of its operations and the quality of its product in a fast-changing and highly competitive marketplace; and which will at the same time allow employees to experience a sense of accomplishment and satisfaction from making an active and valuable contribution to the success of an enterprise in which they invest much of their working life." (emphasis added).

(P.C. Weiler, "Governing the Workplace - The Future of Labor and Employment Law" (Cambridge, Massachusetts: Havard University Press, 1990), pages 191-192; see also P. Weiler and G. Mundlak, "New Directions for the Law of the Workplace" (1993), 102 Yale Law Journal 1907, pages 1921 ff.)

There is growing recognition, even in legislative forums, of the need to move toward increasing employee involvement in workplace decision-making. For example, the British Columbia Labour Relations Code (S.B.C. 1992, c. 82, s. 53) requires that every collective agreement must contain a clause providing for the establishment of a consultation committee for discussion on issues relating to the workplace. As described in section 53(3), the purpose of the consultation committee is to encourage employee participation in the resolution of workplace issues and to adapt to changes of the current marketplace. The B.C. Board recognized, on two occasions, that this section illustrates the B.C. legislator's intention to encourage employee involvement in the decision-making process (see: South Peace Home Support Association, BCLRB

No. B60/94, February 18, 1994. and City of Kamloops, BCLRB No. B420/93, December 16, 1993.)

Greater consultation and interaction between management and labour on workplace issues is not only desirable but, in the current social and economic milieu, becoming increasingly necessary. In order for labour and management to develop the constructive labour relations and collective bargaining practises which Parliament intended to support and foster by promulgating the Canada Labour Code, parties, such as the union and employer at CBC, faced with the demanding circumstances that presently exist, must adopt progressive and realistic industrial relations strategies. Strategies that both acknowledge the existing economic and competitive realities, as well as appreciate the necessary mutual interdependence of the union and employer in promoting and achieving the common well-being of both the employer's operation and the employees' working conditions to "ensure" in the words of Parliament, "... a just share of the fruits of progress to all" (Preamble of the Code).

In the prevailing circumstances at the CBC, it is understandable why the employer sought to establish a process that would facilitate the kind of broad-based employee involvement it hoped to achieve. However, in a union environment, the employer cannot institute an employee participation program - such as OFC was - which focuses on areas that are directly the concern of the union in the collective agreement, or on the bargaining table, without involving the union itself in the establishment and conduct of the process. To be successful, any consultative program to be implemented by the employer in a unionized workplace must involve the union in a meaningful way. To insure that the consultative process established does not offend the provisions of the Code, the employer must ensure that its implementation does not serve to subvert, circumvent or replace the union in its legitimate role as exclusive bargaining agent, or, in the words of section 94, otherwise interfere with the administration of the trade union or its representation of the employees.

By the same token, the union should not be in a position to derail the consultative process simply by refusing to participate. Where progressive labour relations projects are instituted or attempts made to do so, current labour relations realities dictate that the Board cannot look at the employer's conduct in the abstract. In the circumstances of the present case, had the union been consulted and serious provision made for its participation in the process by the employer, the Board may well have taken another view of the matter (Canada Post Corporation (1985), 63 di 136 (CLRB no. 544)).

The union cannot enlist the assistance of the Code to derail an otherwise genuine attempt by the employer, made within the confines of the Code, to implement effective industrial labour relations strategies designed to involve the union and its members in addressing required workplace changes in order to meet economic and industrial relations realities and to ensure the overall common well-being of the employer, the trade union and, most importantly, the employees.

If the employer makes a genuine and reasonable effort to involve the union in a consultative process - that meets the requirements discussed earlier herein - and the union refuses to participate, the Board may well decline, in the appropriate circumstances, to exercise its discretion to grant a remedy pursuant to section 99, even if the subsequent conduct of the employer - strictly speaking - constitutes a breach of section 94.

VII

The union's complaint also contained the following allegation:

"Additionally, the respondent has interfered with the complainant's ability to communicate with its members by unilaterally discontinuing a

longstanding practice of distributing the complainant's internal mailings to its members. No explanation was provided for this sudden and unwanted change in practice. In fact, the respondent's refusal to deliver the complainant's union mail to its members only came to light after it became apparent that the complainant's bargaining unit members were not receiving important union correspondence. The respondent's unilateral decision was never discussed with the complainant prior to its implementation."

Any substance to the union's allegation with respect to the distribution of its internal mail must be grounded in the establishment of the preliminary fact that the CBC interfered with a "longstanding practice of distributing the complainant's internal mailings to its members."

In our view, that fundamental fact was not established.

Margie Turgeon, the Manager of Mail Courier, Printing and Duplicating at CBC's headquarters in Toronto, testified that, to her knowledge, the union never used CBC's internal system to distribute its mail to its members. Prior to 1989, Ms. Turgeon was a member and a chief steward for CUPE. According to her evidence, while she worked at, and subsequently managed, the Mailing, Printing and Duplicating operations at CBC, it was not CBC's policy to send out the union's mail. She recalled being specifically asked to distribute union mail and declined to do so unless she received directions from Ottawa. She testified that it has always, in fact, been the employer's practice not to distribute any non-CBC mail if it is aware that it is being introduced into the system.

Of all the witnesses who testified in this regard, Ms. Turgeon appeared to have both the most knowledge and the best recollection of the facts and circumstances surrounding CBC's practice with respect to the distribution of the union mail. Her evidence was unequivocal in that regard and the Board accepts it.

We are satisfied that there was not, in fact, a longstanding practice of distributing the complainant's internal mail of which the employer was either aware or could be deemed to have approved.

Accordingly, the aspect of the union's complaint dealing with the allegations regarding the employer's refusal to deliver its internal union mail is dismissed.

VIII

There was no evidence to support a conclusion that the employer breached section 96 of the Code.

IX

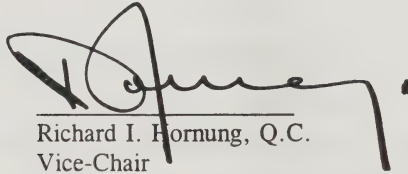
Although the employer's conduct clearly violated the provisions of section 50, the parties reached a collective agreement in September 1993. Insofar as the evidence failed to disclose that the violation of the duty to bargain in good faith inhibited the progress or the outcome of those negotiations, the Board does not find it appropriate to order any remedy with respect to the employer's breach of section 50 of the Code.

However, with respect to the violation of section 94(1)(a) of the Code, the Board, pursuant to its powers conferred by section 99:

(1) declares that the employer, by implementing the OFC process as described herein, without including the union itself in the development and implementation of the consultation process, violated section 94(1)(a) of the Canada Labour Code;

(2) orders the employer to cease and desist from interfering in the union's representation rights by involving employees in direct consultation and discussion through the "Opportunities for Change" program without including the union itself in the development and implementation of that consultation process; and

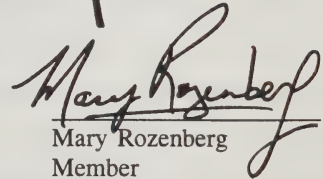
(3) orders the employer to post copies of this decision at all of its premises where employees have access, no later than January 15, 1995 for a period of at least 20 days.



Richard I. Hornung, Q.C.
Vice-Chair



Michael Eayrs
Member



Mary Rozenberg
Member

information

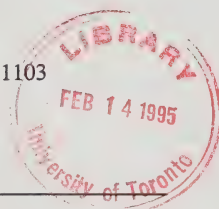
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Summary

Brotherhood of Maintenance of Way Employees, *complainant*, Canadian National Railway Company, *respondent*.

Board File: 745-4751
CLRB/CCRT Decision no. 1103
January 12, 1995



Résumé

Fraternité des préposés à l'entretien des voies, *plaignante*, et Compagnie des chemins de fer nationaux du Canada, *intimée*.

Dossier du Conseil: 745-4751
CLRB/CCRT Décision n° 1103
le 12 janvier 1995

The complainant trade union alleges that the employer breached section 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations) when it interfered with its representation of employees in the bargaining unit by offering a "buy-out package" directly to employees. More specifically, the complainant argues that it was important for the effective execution of its obligations to the bargaining unit members that it be able, in a practical way, to counsel employees with respect to the advantages or disadvantages of accepting a buy-out package.

The Board concludes that the employer was not bargaining directly with employees on a matter which was or might have been the subject of negotiations between the parties, but was applying the terms of the employment security agreement entered into by the parties. The employer gave the union adequate notice of the likelihood of organizational changes to be implemented and of its decision to apply the terms of the employment security agreement such as the "optional lump sum severance payment". The Board determines

Le syndicat plaignant allègue que l'employeur a enfreint l'alinéa 94(1)a) du Code canadien du travail (Partie I - Relations du travail) lorsque celui-ci s'est ingéré dans la représentation des employés de l'unité de négociation en leur faisant directement une offre d'incitation au départ volontaire. Et plus précisément, le syndicat plaignant prétend qu'il était très important, pour qu'il puisse s'acquitter efficacement de ses obligations à l'égard des membres de l'unité de négociation, qu'il soit en mesure de conseiller, de façon pratique, les employés quant aux avantages ou désavantages d'accepter une offre d'incitation au départ volontaire.

Le Conseil conclut que l'employeur n'a pas négocié directement avec les employés en ce qui a trait à une question qui faisait ou pouvait faire l'objet des négociations entre les parties. L'employeur appliquait plutôt les modalités de l'entente sur la sécurité d'emploi conclue par les parties. Il a donné au syndicat un avis suffisant quant aux changements organisationnels qui devaient être mis en oeuvre et à sa décision d'appliquer certaines modalités de l'entente sur la sécurité d'emploi, notamment le versement d'une

that, at any time since the employment security agreement was entered into, the union had the opportunity to give general advice to its members with respect to "lump sum severance payment" packages. The complaint is therefore dismissed.

indemnité forfaitaire de départ. Le Conseil estime que, depuis la conclusion de l'entente sur la sécurité d'emploi, le syndicat a eu la possibilité de conseiller ses membres quant à l'offre d'indemnité forfaitaire de départ. La plainte est donc rejetée.

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Travail

Reasons for decision

Brotherhood of Maintenance of Way
Employees,

complainant,

and

Canadian National Railway Company,

respondent.

Board File: 745-4751

CLRB/CCRT Decision no. 1103

January 12, 1995

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Mr. Michael Eayrs and Ms. Mary Rozenberg, Members. A hearing was held on January 3 and 4, 1995, at Montréal.

Appearances

Mr. Michael Cohen, for the complainant; and

Mr. Jacques Perron, for the respondent.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

At the outset of the hearing in this matter the Board heard the representations of the parties on certain preliminary matters, and after deliberation, made the following ruling, in which the nature of the application and certain background facts, as well as the material provisions of the Canada Labour Code, are set out;

II

"The complaint before us is one of alleged violation of section 94 of the Canada Labour Code. From all of the documentation before us, it is clear that the portion of that section material to this case is section 94(1)(a), which provides that:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union."

In the instant case, the complainant trade union alleges, in effect, that the employer has, inter alia, interfered with its representation of employees in the bargaining unit for which the trade union is bargaining agent, by offering directly to employees a "buy-out package". In paragraph 3(g) of the complaint, it is alleged that this offer was made on February 28, 1994. The employer denies that allegation, at least with respect to the precise date. It is admitted, however, that such an offer was in fact made to employees, and it is stated that the offer has been accepted by, and payments pursuant to it made to, some 198 employees.

It will be unnecessary for the Board to make any finding as to the precise date on which the offer was made. If a formal objection were made on the basis referred to, we would have no hesitation in allowing the amendment of the complaint to refer to the actual date or dates on which any buy-out offer was made.

In its notice of hearing, the Board, having regard to matters raised in the respondent's reply, advised the parties that it would hear argument on two

questions: a) whether the facts alleged, if proved, would support the conclusion that there had been an unfair labour practice under the Canada Labour Code; and b) whether or not, in the circumstances, the Board should refer the question to arbitration.

We shall deal with the second point first. It does not appear that any grievance or arbitration proceedings have been instituted, and in any event, the employer argued this morning that the question would be academic, since the company did proceed to make buy-out offers to employees and such offers have been accepted, at least to the extent we have indicated. This particular exercise would appear to be over. The company did, after this complaint was filed, issue a notice of technological, operational or organizational change pursuant to article 8.1 of the employment security and income maintenance plan in effect between the parties. Whether or not such notice is required may be a question for arbitration in some cases, but in the instant case, the notice has in fact been issued. Article 7.9 of the employment security agreement does contemplate a procedure for "voluntary separation" and again, questions may arise under that provision which would be appropriate for arbitration. In any case, however, the complaint before us raises a question with respect to which determination as to the meaning or applicability of the employment security agreement would be, at most, ancillary. The question whether or not there has been an interference with a trade union's representation of employees is a quite distinct one, and one which is within the exclusive jurisdiction of this Board. Without elaborating on the Board's jurisprudence in this respect, we are of the view that this Board should proceed in the matter, without deferral to any other procedure.

We turn now to the first question referred to in the notice of hearing.

The remedies sought in the application were:

- a) the respondent's immediate withdrawal of the buy-out package pending the fulfilment of its obligations under the employment security agreement; and
- b) a declaration that the respondent has violated the Canada Labour Code by not dealing with the complainant in its capacity as bargaining agent for, and representative of, the employees in question.

The respondent employer has argued that since the buy-out offers have been made, accepted and, it appears, acted on, the first remedy is no longer available, and the complainant trade union has agreed that it is not realistic to request such relief now. The complainant does, however, assert that declaratory relief would be of value, and helpful with respect to the relations between the parties.

In our view, it is desirable to proceed in this matter without delay. From all of the documentation before us, and from the statements of counsel this morning, it would appear very likely that, having regard to the very limited and, in our view, insignificant differences between the parties on questions of fact, the matter may now be argued on the basis indicated in the notice of hearing. Mr. Cohen, counsel for the complainant, indicated that he wished to call certain evidence relating to the conduct of the employer on allegedly similar occasions in the past. Mr. Perron, counsel for the respondent, advised that he would be unable to deal with such evidence this week, and that position is quite understandable, given the terms of the notice of hearing. While the sort of evidence to which Mr. Cohen refers is at least arguably relevant, it is our view that the matter may fairly be argued on the basis set out in the notice of hearing, without reference to the evidence in question. It is, we think, possible that the matter can be decided without reference to such evidence. In the interest of avoiding delay, we believe that course

should be followed. If, following argument, the Board should be of the view that evidence should be heard in order to permit a determination of the matter, then of course a further hearing for that purpose will be scheduled. For now, however, we propose to hear the arguments of counsel on the substantial question.

The Board wishes to direct the attention of counsel to a very recent decision of the Board in Canadian Broadcasting Corporation 1994, as yet unreported CLRB Decision No. 1102, where a related issue - at least an arguably related issue - was before a somewhat different panel of the Board. In order that counsel may address fully the matters in issue, we will ask the clerk to supply copies of that decision to counsel, and we propose to adjourn now for the rest of this afternoon and hear argument tomorrow morning."

III

When the hearing resumed the next morning, the parties proceeded to argue the matter on the basis mentioned. It is clear that the company, faced with a difficult business situation, engaged in a series of studies of the organization of its work-force, and there can be no doubt that a reduction of the work-force was contemplated. The union was invited to participate in such studies, but declined to do so, taking the position, to put the matter very generally, that it sought strict application of the provisions of the collective agreement and of the job security and income maintenance agreement in effect between the parties. Article 8.1 of the job security agreement requires the company to give certain notice to the union before implementing any technological, operational or organizational change, and other provisions of article 8 contemplate negotiations between the parties on various matters arising out of such changes.

From the documentation before us, and the uncontradicted representations of the parties, it is clear that in its various communications or invitations to the union, the

company indicated that its studies would eventually result in the issuing of a notice pursuant to article 8 of the job security agreement. As we noted in our ruling, set out above, the company did in fact issue such a notice some time after this complaint was filed.

An understanding of the situation also requires reference to "employment security", which, by article 7.1 of the employment security agreement, is provided to employees who have completed eight years of "Cumulated Compensated Service" with the company. By article 7.2 of that agreement,

"An employee who has Employment Security under the provisions of this Article will not be subject to layoff as the result of a change introduced through the application of article 8.1 of The Plan".

That is, employees who might otherwise have been subject to layoff as a result of a technological, operational or organizational change will, if entitled to employment security, not be laid off, but will rather receive the benefits contemplated under the employment security plan. That plan, however, does contemplate situations in which employees might be "bought out" of the employment relationship, with a consequent termination of employment security benefits. Article 7.9 of the employment security agreement provides as follows in that respect:

"In special cases where the Company is facing a continuing liability for employees on Employment Security status with no potential for meaningful work available to such employees, the Company shall offer an optional lump sum severance payment to employee [sic] on Employment Security status, or to an employee who is actively employed in a classification whose voluntary separation would result in the removal of an employee from Employment Security status, on the basis of the following formula - - -"

It is asserted, and not denied, that the "buy-out" offer which was made to employees complied with the formula set out in article 7.9. There is no issue before us in that respect. Whether or not this was indeed a "special case" within the meaning of article

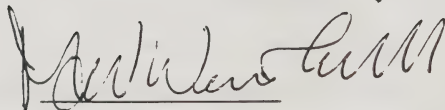
7.9 (in which case the company would appear to have been required, under the terms of the agreement, to make an offer of "an optional lump sum severance payment") is, again, not a question which is before us for determination. The question before us is whether or not, in making the buy-out offer as it did, the company was interfering with the union's right of representation of the employees within the bargaining unit.

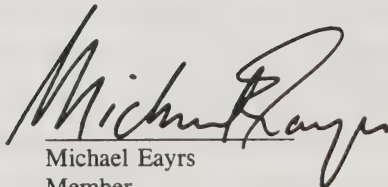
It was argued for the complainant trade union that it was important for the effective meeting of its obligations to its members that it be able, in a practical way, to counsel members with respect to the advantages or disadvantages of accepting a buy-out package. In view of the wide geographical distribution of the work-force, the nature of the work and the employees' schedules, such counselling would require a certain period of time, and a reasonable degree of notice. These are valid considerations. As far as the question before us is concerned, however, they go more to the union's administration of its own affairs than to the conduct of the company. This is because, on the facts of this case as they have been presented to us, and having regard only to those that are not in dispute or which (the employment security agreement itself, for instance) are of a public nature, the respondent employer here was not "bargaining directly" with employees on a matter which was or might have been the subject of negotiations between the parties. If we considered such to be the case then we would, as another panel of the Board did recently in Canadian Broadcasting Corporation, supra, conclude that the company had violated section 94(1)(a) of the Code. In the instant case, however, the respondent employer at least purported to "offer an optional lump sum severance payment" to employees which was, or which is asserted to have been, in accordance with the formula set out in the employment security agreement and which - if article 7.9 was indeed applicable in the circumstances - the employer would be required to make to them. The company was not, in these circumstances, seeking to by-pass the union, but was applying the terms of the agreement. The union had, clearly, adequate notice of the likelihood of such a situation arising, and at least some notice that the employer would apply the terms of article 7.9. At any time since the employment security agreement, and in particular article 7.9 thereof was entered into, the union had the opportunity to give general advice to its members with respect

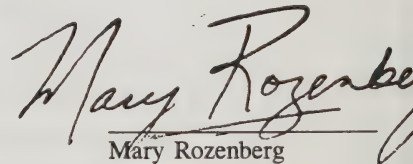
to such offers, although of course the particular economic and other circumstances obtaining at any particular time would have to be taken into account.

In the circumstances of the instant case, then, we cannot conclude, assuming the accuracy of the union's allegation, that the employer was interfering with the union's representation of employees in the bargaining unit. The employer did not, and did not purport to bargain individually with such employees, or to by-pass the union in this respect. Rather, it purportedly applied the provisions of a negotiated agreement. Whether or not it applied those provisions appropriately in the circumstances is not a question for this Board. Even if the employer was wrong in its application of the agreement, however, its actions did not, in the circumstances of this case, constitute a form of individual bargaining with employees, and was not an interference with the representation of those employees by the trade union.

Accordingly, there has been no violation of section 94 of the Code, and the application must be dismissed.


J.F.W. Weatherill
Chairman


Michael Eayrs
Member


Mary Rozenberg
Member

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Summary

Canadian Union of Postal Workers,
complainant, and Canada Warehousing
Services, *respondent*.

Board Files: 745-4907
555-3728

CLRB/CCRT Decision no. 1104
January 16, 1995.

Résumé

Syndicat des postiers du Canada, *plaignant*, et
Canada Warehousing Services, *intimée*.

Dossiers du Conseil: 745-4907
555-3728

CLRB/CCRT Décision n° 1104
le 16 janvier 1995

The Canadian Union of Postal Workers filed a complaint with the Canada Labour Relations Board alleging that the employer had contravened sections 94(3)(a) and 96 of the Canada Labour Code. The union alleged that the employer met with the employees and threatened them with dismissal if they voted in favour of the union.

The employer became concerned that confusion had been created among the employees when the union distributed leaflets outside its premises. It decided to meet individually with those employees who were to take part in a representation vote.

The Board found that the employer did hold captive audience meetings with the affected employees. By communicating in the manner it did with the employees, the employer violated the Code since the captive audience meetings brought a chilling effect to the union's organizing drive.

Le Syndicat des postiers du Canada a déposé auprès du Conseil canadien des relations du travail une plainte alléguant que l'employeur avait enfreint l'alinéa 94(3)a) et l'article 96 du Code canadien du travail. Il allègue que l'employeur a rencontré les employés et les a menacés de congédiement s'ils votaient pour le syndicat.

L'employeur s'était inquiété de la confusion créée parmi les employés lorsque le syndicat leur avait distribué de la documentation en dehors de ses locaux. Il a donc décidé de rencontrer individuellement les employés qui devaient participer à un scrutin de représentation.

Le Conseil juge que l'employeur a en fait tenu des rencontres où les employés visés avaient bien été obligés de l'écouter. En communiquant comme il l'a fait, l'employeur a enfreint le Code étant donné que les rencontres ont jeté un froid sur la campagne de syndicalisation.

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LES MOTIFS DE DECISION DU CCRT SONT
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Reasons for decision

Canadian Union of Postal Workers,

complainant,

and

Canada Warehousing Services, a Division of
Canada Messenger Transportation Systems,

respondent.

Board Files: 745-4907
555-3728

CLRB/CCRT Decision no. 1104
January 16, 1995

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin Davis and Michael Eayrs, Members.

Appearances

Mr. Gordon Fischer, Regional Union Representative, assisted by Ms. Suzanne Dennis, National Director (CUPW), for the complainant; and

Mr. Benjamin R. Hecht, Counsel, assisted by Mr. Grant Hekle, for the respondent.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

On September 16, 1994, the Canadian Union of Postal Workers (CUPW) filed a complaint with the Canada Labour Relations Board alleging that the employer had contravened sections 94(3)(a) and 96 of the Canada Labour Code.

Sections 94(3)(a) and 96 read as follows:

"94. (3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, ...

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union. "

CUPW alleges that the employer met with the employees and threatened them with dismissal if they voted in favour of the union. It became aware of the meetings shortly after the Board ordered a representation vote on September 14, 1994.

The main employer representative who conducted the meetings with the employees was Grant Hekle, Vice-President of Marketing for the employer. Mr. Hekle learned of the certification application around August 14. He says he thought nothing more of it and left Winnipeg in the third week of August, returning September 9. During this time he stayed in touch with various supervisors.

On September 12, Mr. Hekle received a call from a supervisor who told him that a "bunch of guys" were handing out leaflets in front of the employer's premises. Everyone, including those employees not involved in the certification application, as well as employees of other companies, received a copy of the leaflet.

Mr. Hekle says he felt the leaflet had created confusion amongst the employees. According to him employees not involved in the certification wondered if they had a right to vote or if they were about to be unionized. They were also concerned about certain statements in the leaflet, in particular the one mentioning guaranteed jobs. Mr. Hekle's reaction was to meet individually with the affected employees. He had

a supervisor call the employees and let them know that he wished to meet with each of them.

According to Mr. Hekle, those meetings covered a wide range of topics. He wanted to make sure that each employee was aware of the length of the commercial contract between the employer and Canada Post Corporation (Canada Post). He stated that the contract was good for two years, after which the parties had an option to review. He also explained the separate elements of the contract and wondered aloud if Canada Post could actually contract out the elements separately. He suggested the employees find out from CUPW and let him know. He further suggested they get all promises from CUPW in writing.

There was also discussion of various rumours in the work place. According to one of those rumours, Canada Post was going to build a larger facility and would not be contracting out any more. In addition, some employees raised the matter of a salary increase and other work-place problems.

Mr. Hekle told the Board he only wanted the employees to know the truth and he denied telling them they would lose their jobs or threatening them with dismissal if CUPW was voted in.

CUPW's witnesses confirmed they were either called at home to attend a meeting or advised when they came in to work that Mr. Hekle wished to speak to them. At each meeting a supervisor and Mr. Hekle were present.

The witnesses said the meetings focused on discussions concerning the company's contract with Canada Post. Mr. Hekle explained the elements of the contract and said that it was coming up for renewal. Discussions took place concerning whether or not the contract would continue to be valid if CUPW came in or whether another company such as United Messenger might take over all or part of the contract. Also discussed

at the meetings was the rumour that Canada Post was going to build a new facility and that work now carried out by Canada Messenger would in the future be performed by Canada Post employees. Mr. Hekle asked that they contact CUPW and get answers to questions on this matter. As well, other matters, such as wages, were raised by some employees.

In Ganeca Transport Inc. (1990), 79 di 199; and 90 CLLC 16,054 (CLRB no. 780), the Board reviewed what the employer's conduct should be during the certification process.

*"The Board had the following to say on the same subject in **Bank of Montreal (Bank and Cecil Streets Branch, Ottawa)** (1985), 61 di 83; and 10 CLRBR (NS) 129 (CLRB no. 518):*

'The point of departure for previous Board decisions is that, however much an employer may feel that his unfettered right to manage and to maximize his profits may be modified if his employees choose to give up the making of individual contracts of employment and decide to switch to collective bargaining and collective agreements, it is basically not his business what they want to do. Above all, it is contrary to law if he places pressure on them to dissuade them from making such a decision. It would be naive in the extreme, of course, to believe that the law can make employers accept with equanimity the change in the balance of power that unionization usually brings about. But it can, and is designed to, deter employers from overt behaviour that would coerce or intimidate employees into not implementing their right to associate in accordance with the scheme of the Canada Labour Code.

Occasionally, such behaviour takes the form of dismissals or other similarly heavy-handed reactions to a prospective diminution of bargaining power. But it can also take the form of communications. Statements to employees can interfere quite effectively with the formation of a trade union or can leave persons with a real sense that they will suffer unhappy consequences if they join or form a union.

Obviously, as the Board has made clear in previous decisions, an employer cannot be expected to stop communicating with his employees simply because some are engaging in union organizing activity. Normal business communication is unaffected by the

provisions of the Code which have been cited earlier. Nor do they constitute an attempt to control the expression of opinion on unions and collective bargaining by an employer anywhere outside the narrow and specific context implicit in their language. It is valid to hypothesize that these provisions would not act as a bar to an employer responding fairly to unsolicited employee questions about unions or answering publicly and appropriately any propaganda that might be directed against him by union organizers. But there is nothing in the Code which suggests that an employer should be or may be party to the employees' actual decision-making process about forming or not forming a union and everything to suggest that he should maintain a neutral and hands-off stance while the employees determine their destiny themselves free of employer pressures.'

(pages 101-102; and 147-148; emphasis added)

*As the Board pointed out in this case, statements made by an employer to its employees during a union organizing campaign have a not inconsiderable impact and significance. In this regard, it repeated what it said earlier in **Bank of Nova Scotia (Selkirk, Manitoba)** (1978), 27 di 690; and [1978] 1 Can LRBR 544 (CLRB no. 123):*

'... The scope of permissible employer communication to employees about employment relations matters and union affairs at the time of discussion among employees about exercising their right to be represented by a union is necessarily limited. Words from an employer have an impact that is far more personal and immediate than those from politicians or many others who affect an employee's life. A threat or a promise, no matter how veiled, is quickly translated by an employee into tangible consequences that can have a serious and readily perceived cost to the employee. To minimize and discourage this trauma for employees and promote an environment where employees can and do feel confident their right under section 110 is real, the Board in administering sections 184 and 186 places rigid limitations on employer communications.'

(pages 698-699; and 551; emphasis added)

This then means that in situations where the nature of the communications an employer carries on with its employees is questioned, the Board will closely examine not only the content of

these communications, but also the general context in which they occur.

*For example, it will pay particular attention to the reasons for and the content and conduct of meetings called by the employer (see **Nationair (Nolisair International Inc.)** (1986), 67 di 217 (CLRB no. 596); **Can-Coast Marine Inc.** (1987), 68 di 165 (CLRB no. 610); and **Brewster Transport Company Limited** (1986), 66 di 1; 13 CLRB (NS) 339; and 86 CLLC 16,040 (CLRB no. 574)). Similarly, the Board will examine generally the various aspects of an employer's conduct where two associations are seeking the support of its employees, in order to determine whether this conduct constitutes a contravention of the unfair labour practice provisions (see **Graham Cable TV/FM** (1986), 67 di 57; 14 CLRB (NS) 250; and 86 CLLC 16,047 (CLRB no. 588))."*

(pages 210-212; and 14,460-14,461)

There was conflicting testimony as to what was actually said at the individual meetings with employees. However, there can be no doubt that Mr. Hekle did hold captive audience meetings with the employees. These meetings took place on the employer's premises, at the employer's request. The meetings were held just before a representation vote was to take place. And at the meetings questions regarding the future impact on employees if the union were certified were raised.

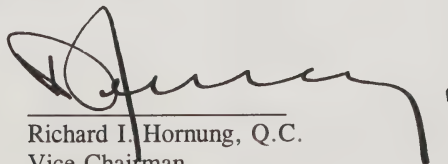
Even though the employer says he was concerned that all employees in the work place had received leaflets from CUPW, the one-on-one meetings were held only with those employees who were about to take part in the representation vote.

When the employees came away from the one-on-one meetings, they were concerned about the effect a representation vote would have on their future. At the hearing, one employee stated clearly that, as a result of his meeting with Mr. Hekle, he was worried he would no longer have a job if CUPW was voted in.


By communicating in the manner he did with the employees, Mr. Hekle violated the Code, since the captive audience meetings brought a chilling effect to the union's organizing drive.

The Board finds that the employer did violate sections 94(3)(a) and 96 of the Canada Labour Code. Pursuant to section 99 of the Code, the Board therefore orders the employer (1) to comply with and cease violating sections 94(3)(a) and 96 of the Code; and (2) to distribute a copy of this decision within five days of receiving it to each employee. The Board further orders that a new representation vote be held as soon as possible after the distribution of this decision. Those employees eligible to vote shall be the same as in the original vote.


The Board appoints Mr. Gordon MacIsaac, Deputy Regional Director, or a person designated by him, to assist the parties in implementing these orders. The Board shall remain seized of these matters in order to deal with any problem that may arise in connection with the implementation of these orders and to issue a formal order should such be required.



Richard I. Hornung, Q.C.
Vice-Chairman



Calvin Davis
Member



Michael Eayrs
Member

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Summary

Stephen Elnicki, *applicant*, and Loomis Armored Car Service Ltd., *employer*.

Board File: 950-259
CLRB/CCRT Decision no. 1105
January 31, 1995



Résumé

Stephen Elnicki, *réquérant*, et Les Blindés Loomis Ltée, *employeur*.

Dossier du Conseil: 950-259
CLRB/CCRT Décision n° 1105
le 31 janvier 1995

Canada
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canadien des
relations du
travail

Referral of a safety officer's decision pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health). Due to scheduling problems, the employer decided to remove the armed guard who used to escort the custodian who serviced the customers at the Vancouver International Airport. This decision reduced the crew from three to two persons (the driver and the custodian). The applicant, a custodian, exercised his right to refuse work pursuant to section 128 on the grounds that the removal of the guard created an unsafe situation for his crew.

Given the situation that existed on the day of the applicant's refusal, the Board concluded that the safety officer erred in deciding that no danger existed. The definition of "danger" has to be evaluated within the context of each industry and the particulars of the workplace. The considerable distance covered by the custodian from the truck to Loomis' clients, the large crowds present on a daily basis at the airport, the significant number of entrances and exits, the existence of isolated areas accessible to the public as well as other factors found relevant all contributed to the Board's conclusion that the work of the custodian on a two-person

Renvoi d'une décision d'un agent de sécurité conformément au paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail). En raison de problèmes liés aux horaires, l'employeur a décidé de ne pas faire accompagner d'un garde armé le gardien qui s'occupait des clients à l'Aéroport international de Vancouver. Par conséquent, l'équipe se composait maintenant de deux personnes (chauffeur et gardien) au lieu de trois. Le requérant, un gardien, a exercé son droit de refuser de travailler aux termes de l'article 128 au motif que ce retrait engendrait une situation dangereuse pour son équipe.

Étant donné la situation qui existait le jour même où le requérant a refusé de travailler, le Conseil juge que l'agent de sécurité a commis une erreur en décidant qu'il n'y avait pas de danger. La définition de «danger» doit être évaluée en fonction du secteur d'activité et des particularités du lieu de travail. La distance considérable que doit parcourir le gardien entre le camion et les clients de Loomis, les foules nombreuses qui se présentent tous les jours à l'aéroport, le nombre important de points d'entrée et de sortie, la présence d'endroits isolés accessibles au public, et d'autres facteurs jugés pertinents ont contribué à la

crew at the airport run, without an armed guard, created in the circumstances a danger within the meaning of the Code.

The Board directs the employer, pursuant to section 130(1)(d), to provide an armed guard to the crew assigned to the Vancouver International Airport run and that this person keep visual contact with the custodian at all times while outside the vehicle.

conclusion du Conseil que le travail effectué par le gardien membre de l'équipe de deux personnes affectée au parcours de l'aéroport sans garde armé, créait dans les circonstances un danger au sens du Code.

Le Conseil ordonne à l'employeur, en vertu de l'alinéa 130(1)d), d'inclure un garde armé dans l'équipe affectée au parcours de l'Aéroport international de Vancouver. Cette personne doit garder dans son champ de vision le gardien pendant tout le temps que celui-ci n'est pas dans le camion.

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Reasons for decision

Stephen Elnicki,

applicant,

and

Loomis Armored Car Service Ltd.,

employer.

Board File: 950-259

CLRB/CCRT Decision no. 1105

January 31, 1995

The Board was composed of Mr. Serge Brault, Vice-Chair, sitting as a single member panel pursuant to section 156 of the Canada Labour Code (Part II — Occupational Safety and Health).

Appearances

Mr. Eugene Jamieson, for Mr. Stephen Elnicki; and

Mr. Derek James May, for Loomis Armored Car Service Ltd.

I - BACKGROUND

The Board has received, pursuant to section 129(5) of the Code (Part II — Occupational Safety and Health), a referral of a safety officer's decision dealing with a refusal to work exercised by Stephen Elnicki on February 18, 1993. In his decision, the safety officer concluded that no danger existed within the meaning of the Code and that the issue related rather to staffing, which could not be resolved through a refusal to work under Part II of the Code.

The relevant sections of the Code read as follows:

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board.

130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2). "

The refusal to work occurred in the following circumstances. In February 1993, Loomis Armored Car Service Ltd. ("Loomis") removed the armed guard who used to escort the custodian who serviced customers at the Vancouver International Airport. The change was introduced because of scheduling problems on the Metrotown Shopping Mall run which was serviced at about the same time of day as the airport run. The employer used the same armed guard at both locations; however, it decided to continue to assign the armed guard to the Shopping Mall run, but not to the airport run.

That decision brought the airport crew down from three to two persons (composed of a driver and a custodian).

Mr. Elnicki was, on February 18, 1993, the custodian assigned to the airport run. As he saw that no guard would escort him, Mr. Elnicki exercised his right to refuse to

work pursuant to section 128 of the Code on the grounds that the removal of the guard created an unsafe situation for his crew.

Even though the incident goes back to February 1993, this Board only heard evidence and arguments in September 1994. This matter had been held in abeyance pending a decision of the British Columbia Labour Relations Board on its constitutional jurisdiction over Loomis' activities in British Columbia. In that decision rendered in July 1994, the BCLRB found that the employer fell within federal jurisdiction for labour relations purposes (Loomis Armored Car Service Ltd., no. B264/94, July 11, 1994, dismissing reconsideration of B435/93).

During the hearing, at the parties' invitation, the Board had the opportunity to tour along with all parties involved the exact location of Mr. Elnicki's run at the airport.

II - EVIDENCE

Upon arriving at the airport, the driver parks the Loomis truck at the top level around 12:30 p.m. According to standard procedure, the driver who must service a number of companies never leaves the vehicle until the custodian returns.

On his first stop he drops off coins at the Cara office. As for the other stops, he picks up, in large canvas plastic transparent bags, money and other related valuables from airline companies and other clients.

On his run, the custodian uses a two-wheel hand-cart to carry his load around the different locations in the airport. As a right-hand person, Mr. Elnicki explained that he keeps his weapon on his right-hand side and that he tries to keep that hand free. He uses his left hand to push the two-wheel hand-cart. At the time Mr. Elnicki did not carry a two-way radio to remain in contact with the driver. The custodian now does. Mr. Elnicki explains that he normally carries his radio on his left-hand side.

On the day of the refusal in February 1993, there were not enough radios for all Loomis crews. This situation has now been corrected but the radios provided are not voice activated, which means that the custodian would need to push or turn a button to activate the radio in case of an emergency.

The airport run requires that the custodian walk through large crowds while pushing the cart. He must also use public elevators to get to the various clients' premises. The custodian may also choose to ride the airport's central escalator, again in a crowd.

As well, the custodian has to walk a long isolated corridor, in a basement, in a location that is not secured by commissionaires or security guards. The only safety device in this isolated area is a camera. It was not clear what the actual purpose of that camera was except maybe to provide overall information on the traffic in the hallway.

The airport run takes approximately 30 minutes and the custodian is out of visual contact with the driver for most of that time. In the industry, such a run is considered to be very long compared to others.

If the custodian is attacked, company policy states that not only must the driver remain in his truck, but should actually drive away. This well-known practice is described as a deterrent and no custodian expects the driver to come out of the truck in case of such an attack. With both counsel, we visited the RCMP offices on the premises as it was suggested that the company's decision had also been motivated by a beefing-up of the overall security of the airport.

The evidence revealed that three RCMP uniformed officers are in attendance in the airport's public areas on a daily basis. Their work is to control offenses related to airline transportation; they are not specifically supervising the businesses' security, as they have a very busy schedule. The RCMP officer we met did say that the roads

leading to and from the airport could be sealed off in a few minutes should an incident occur.

In summary, there are no safety measures at the airport specifically designed to protect activities such as those Loomis employees must perform in and around the airport.

III - THE PARTIES' POSITIONS

The applicant argued that the danger created by the two-person crew on the airport run is beyond the normal risk factor a security employee is expected to face. In the applicant's view, the employer had based its decision to assign two-person crews to the airport run solely on financial considerations, failing to take into account the employees' genuine safety concerns. Neither the newly acquired radios nor busy RCMP officers present at the airport can provide a sufficient level of security for a Loomis custodian who has to weave through crowds or to walk by himself in isolated areas, yet accessible to the public.

For these reasons, the applicant requested that the Board direct that a three-person crew be re-established for the airport run.

The employer submitted that the risk of armed robbery is inherent to the duties of Loomis employees and that the safety officer rightly stated that the level of danger is not sufficient to justify a refusal to work. In the employer's view, the presence of the RCMP officers at the airport provides security to Loomis employees and, in that sense, the airport is much more secure than a shopping mall. As well, the presence of two cameras and the use of radios contribute to increase security to a suitable level.

The employer further submitted that the presence of an armed guard could indeed have a negative impact. Such a presence could bring greater visibility to the custodian

and to his load and therefore increase the level of danger, as it may be seen as an indication that the custodian is carrying more valuables than he really is. In order to properly assess the risk involved on a run, management explains that they put themselves in the position of professional robbers and ask themselves whether they would attack the location in question.

Alternatively, the employer argued that even if it was found that a two-person crew is more dangerous, the level of danger still does not justify the Board's intervention. The issue is one of staffing and should be resolved at safety committee meetings.

IV - DECISION

The Board first recognizes that the duties of Loomis employees involve a somewhat high level of inherent danger; it is in the nature of that particular trade. However, the Board finds that the situation in which Mr. Elnicki exercised his refusal to work pursuant to the Code did constitute a danger beyond the level of acceptable inherent danger.

The Board has dealt with a similar situation in Gérald Godin (1993), 91 di 140 (CLRB no. 1001), where a Loomis employee refused to work on a two-person crew assigned to the Pearson Building, a federal government building housing External Affairs in Ottawa. In that case, the employee had to walk a corridor of some 300 feet and to take an elevator to the lobby of the building. The Board found that those circumstances amounted to a danger within the meaning of the Code.

Another decision on which the parties relied involved the manning of a Brink's crew. In Richard Boivin (1992), 87 di 36 (CLRB no. 916), the Board did not find that the situation amounted to a danger within the meaning of the Code. The applicant's refusal to work was broadly defined and was directed at any situation where a two-

person crew would be used. It did not really pertain to the situation at a branch of the National Bank. The Board denied the referral.

The parties also referred to a Labour Canada case where safety officer Jacques C. Robert in a ruling dated June 1, 1987 upheld a refusal to work by a Loomis custodian assigned to a run at the Carlingwood Shopping Centre in Ottawa. The custodian had refused to work without a guard. The fact that the driver lost sight of the custodian for approximately 14 minutes while he was in the shopping centre led the safety officer to conclude that there existed indeed a dangerous situation. The safety officer directed the employer to take the following measures:

"(a) to ensure that in cases where an armoured vehicle with a two-person team is dispatched to carry out the business of the employer, that the vehicle should be parked in such a way as to ensure that the driver of the vehicle is able to keep the messenger in constant visual eye contact while the messenger is carrying out his duties; or

(b) to provide a three-man team with instructions that the third person keep the messenger in constant visual contact at all times."

In a somewhat surprising turn of events, that direction was reviewed by a regional safety officer, years later, on June 23, 1993, although the request for review was likely out of time pursuant to section 146(1) of the Code. The regional safety officer believed that constant audible contact between the driver and the custodian was sufficient to bring the level of risk within the confines of inherent danger in the employee's work. His direction reads as follows:

*"to ensure that employees while outside of the vehicle in the course of carrying out their duties are, at all times, **in constant visual or audible contact** with another employee or other person, such as a customer security representative, who is appropriately qualified."*

(emphasis added)

In the instant case, the Board is of the view that the work requires more than constant radio communications.

As mentioned above, the definition of "danger" contained at Part II of the Code must be evaluated within the context of each particular industry and specific circumstances of the workplace. The following non-exhaustive list guides the Board in deciding whether workplace conditions create a dangerous situation for a two-person crew to pursue a particular assignment in the business of armoured car service:

- particular conditions of location (crowds, elevators, etc.);
- amount of time where the custodian and the driver lose visual contact;
- distance covered by the custodian from the vehicle to the various destinations and total duration of run;
- safety measures in place to provide increased protection to the custodian;
- number of entrances and exits on the premises;
- isolated areas on the premises;
- time of day when work is performed;
- relative importance of service point (for example a bank as opposed to a small store);
- any other factor likely to have a significant impact on the level of risk.

With all due respect, the Board does not agree that Mr. Elnicki's refusal to work amounts to a simple staffing issue that should be addressed by another forum. While there is no doubt that it might and should be discussed at the safety committee level, this does not mean that the Board is not a suitable forum to address it in the circumstances.

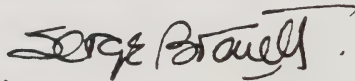
In the business of carrying valuables, circumstances change with every assignment. Depending on circumstances, this may bring about a series of conditions of work that constitute *"a hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected,"* in other words a danger pursuant to section 122(1) of the Code.

At least in this case, it would be assuming a lot, in the Board's view, to pretend that radio communications would suffice to correct the dangerous situation that Mr. Elnicki had to face on February 18, 1993. The custodian servicing the airport is all but left to himself in the middle of an airport at all times. That location is visited by about 10 000 000 visitors every year. The fact that the airport can be sealed off in only a few minutes is not in our view a very convincing argument. Visitors in airports walk around with suitcases, duffle bags, baggage carts, in a word, all sorts of devices that can be used to hide weapons or stolen goods. The custodian could be attacked getting on or off the elevator with absolutely no protection. We do not see how a radio could improve a person's security in such circumstances. In our view, it was surely considerations like these that brought the company to assign an armed guard to this run and we do not see that conditions have changed. A robbery or other incident of that nature is over in approximately 90 seconds. The amount of time in which the custodian could call for help on his radio is very short, if not non-existent. Furthermore, in order to use his radio, the employee would need to press a button on the radio to transmit and thereby choose between his radio and his weapon. The evidence has demonstrated that a custodian's likely first reaction would be to choose his weapon since the driver could not come to his aid given that the driver's duty is to drive away from the site in the case of an attack.

Given the circumstances at the airport on February 18, 1993, the Board concludes that the safety officer erred in deciding that no danger existed for Mr. Elnicki to carry out his assignment without an armed guard.

The considerable distance covered by the custodian from the truck to get to Loomis clients (being away from the vehicle for approximately 30 minutes), the large crowds present on a daily basis at the airport, the significant number of entrances to and exits from isolated areas accessible to the public, the small number of uniformed RCMP officers busy with their own problems and the amounts of money carried by the custodian all contribute to our conclusion that the work of the custodian on a two-person crew at the airport run, without an armed guard, indeed creates a dangerous situation contrary to the Code.

Consequently, pursuant to section 130(1)(b), the Board directs Loomis to provide an armed guard to the crew assigned to the Vancouver International Airport runs. That third person shall at all times keep a visual contact with the custodian while outside the vehicle.

A handwritten signature in black ink, reading "Serge Brault". The signature is stylized with a large, sweeping "S" and a long horizontal stroke at the end.

Serge Brault
Vice-Chairman, pursuant to
section 11 of the Code

